Supreme Court, U.S.
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No. 02-10038

In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Docket Sheet, *Tennard v. Johnson*, No. 4:98-CV-4238, U.S. District Court, Southern District of Texas

2/19/98	2	ORDER granting [1-2] motion to proceed in forma pauperis entered; Parties notified. Petitioner may proceed in forma pauperis in federal habeas proceedings challenging his capital conviction and death sentence, and Mandy Welch of Burr & Welch, Houston Tx. is appointed to represent him. (signed by Judge Lynn N. Hughes) (bj) [Entry date 02/20/98]
12/18/98	3	Prisoner Petition for Writ of Habeas Corpus Death Penalty Case; filed. (bj)
3/30/99	11	MOTION with brief in support for summary judgment by Gary Johnson, Motion Docket Date 4/19/99 [11-1] motion, filed (hl)
4/28/99	15	RESPONSE by Robert James Tennard to [11-1] motion for summary judgment, filed. (hl) [Entry date 04/29/99]
4/28/99	15	CROSS MOTION for summary judgment with Brief in Support by Robert James Tennard, Motion Docket Date 5/18/99 [15-1] cross motion, filed (hl) [Entry date 04/29/99]
7/25/00	19	OPINION on Denial of Writ of Habeas Corpus, entered. Parties notified. (signed by Judge Lynn N. Hughes) (lt)
7/25/00	20	FINAL JUDGMENT denying [3-1] petition for writ of habeas corpus; granting respondent's [11-1] motion for summary judgment; denying petitioner's [15-1] cross motion for summary judgment, entered.

Petitioner's anticipated motion to stay his execution until an anticipated appeal is heard is denied. Parties ntfd. (signed by Judge Lynn N. Hughes) (lt)

10/12/00 25 NOTICE OF APPEAL of [24-1] order by Robert James Tennard, filed. Fee Status: IFP (bwd) [Entry date 10/13/00]

10/17/00 27 ORDER denying Pltf's [26-1] motion for certificate of appealability, entered; Parties notified. (signed by Lynn N. Hughes) (hl) [Entry date 10/18/00]

Docket Sheet, *Tennard v. Cockrell*, No. 00-20915,
U.S. Court of Appeals for the Fifth Circuit

10/20/00 Death penalty case docketed. NOA filed by Appellant Robert James Tennard [00-20915] Awaiting DC Action on 12/4/00. (COA pending DC) (mrw)

11/1/00 District Court notice – COA denied (IN ROA). Date Denied: 10/18/00 [00-20915] Awaiting DC Action ddl satisfied. Motion for COA due on 12/12/00 for Robert James Tennard. Brief in support of COA due on 12/12/00 for Robert James Tennard. (mrw)

1/12/01 Brief filed in support of motion for Certificate of Appealability [3108656-1] by Appellant Robert James Tennard Brief in Support ddl satisfied. [3108657-1] [00-20915] (mrw)

2/1/01 Response/opposition filed by Appellee Gary L Johnson to motion for Certificate of Appealability [3108656-1] by Appellant Robert James Tennard Response/Opposition ddl satisfied. [3126501-1] [00-20915] (mrw)

3/1/02 Opinion filed. Issd in T form? Y Issue mandate due 3/1/02 (ISSUED AS & FOR THE MANDATE) [00-20915] (rmf)

3/1/02 COURT Order filed denying appellant's motion for Certificate of appealability [3108656-1] Copies to all counsel [00-20915] (rmf)

3/19/02 Petition filed by Appellant Robert James Tennard for rehearing en banc. #of copies filed: 20 [3643618-1] Sufficient [Y/N]: y. [00-20915] (mrw)

4/4/02 COURT Order filed denying petition for rehearing en banc [3643618-1] With poll (Y/N)?: n Copies to all counsel. [00-20915] (mrw)

10/15/02 Supreme Court order received granting petition certiorari [3757788-1] by Appellant Robert James Tennard on 10/07/02. [00-20915] (cav)

11/13/02 Supreme Court judgment filed. [00-20915] (jbr)

1/3/03 Case reopened. [00-20915] (rmf)

1/3/03 Opinion filed on Remand from the United States Supreme Court reinstating our panel opinion. Issd in T form? Y Issue Mandate due on 1/24/03. [00-20915] (rmf)

1/3/03 Judgment entered and filed. [00-20915] (rmf)

10/20/03 Supreme Court order received granting petition certiorari [4161264-1] by Appellant Robert James Tennard on 10/14/03. [00-20915] (cav)

Trial testimony of Valerie Soto, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts (trial transcript), 27-47]

* * *

[27] VALERIE SOTO

was called as a witness by the State, and after having been previously duly sworn, testified under her oath as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q Would you state your name for the ladies and gentlemen of the jury, ma'am?

A Valerie Soto.

Q How old are you, Ms. Soto?

A Thirty-three.

Q Do you have any children?

A Yes. I have two.

Q What are their ages?

A Thirteen and four.

Q Are you married, divorced, single?

A Divorced.

Q Have you ever been known by the name of Valerie Ruth [28] Ewing?

A Yes. That's my maiden name.

Q Let me ask you to go back to August 7th, 1979, and I will ask you where you were working at that time.

A Mustang Tractor and Equipment.

Q What did you do with them?

A I was a PBX operator.

Q What's the address?

A 12800 Northwest Freeway.

Q Where were you living?

A In North Houston, on Sherry Spring Road.

Q Who were you living with?

A A roommate, Melissa Fairchild.

Q Anybody else?

A My son.

Q And how old was he at the time?

A Approximately four or five.

Q Let me ask you, in the early morning hours of August 7th, 1979, did you have occasion to come in contact with a Robert James Tennard?

A Yes, I did.

Q Is that individual here in the courtroom?

A Yes, he is.

Q Would you point him out and describe the clothing he's wearing?

[29] A He's right there. He has on a white shirt, with a black tie.

MR. CROWLEY: Your Honor, may the record reflect she has identified the Defendant?

THE COURT: The record will so reflect.

Q Do you recall where it was that you first met him that day and when?

A Yes. It was in the early morning hours. I wa [sic] waiting at the bus stop for the bus.

Q Where was the bus stop?

A At Crosstimbers and 45.

Q Where were you going?

A To work.

Q And how had you gotten to the bus stop?

A My roommate dropped me off.

Q Did you work in the daytime, basically?

A Yes, I did.

Q What time did your roommate drop you off at the bus stop?

A About ten minutes to 6:00.

Q And you were waiting there for the bus?

A Right.

Q How was it that you first met Mr. Tennard?

A He and two other guys pulled up in a car and he was [30] sitting on the passenger side and he got out and jerked me into the car.

Q Did he say anything to you when he jerked you in?

A They threw me in the back seat. The guy in the back seat held me down and he said, "Move, white bitch, and you're dead."

Q Who said that?

A He did, Robert Tennard.

Q How many people were in the car?

A Besides myself, three.

Q Did they call each other any names while they were in the car?

A Yes.

Q What did they call Tennard?

A Black.

Q And what were the other two names that you heard?

A Michael and Doug.

Q Which part of the car did they put you in, the back passenger or the front seat?

A The back.

Q What happened when you were in the back seat? Who was in the back seat with you?

A The guy they called Doug.

Q Where was Tennard sitting?

A In the passenger right front.

[31] Q What happened next? Did Mr. Tennard make any further threats to you:?

A Not at that time.

Q Did you drive for some distance?

A Yes, we did.

Q And which way did you drive?

A I really couldn't tell. They were holding me down; the guy in the back seat was holding me down. He had his hand on my head and holding my head down.

Q Now did Mr. Tennard ever display any type of weapon?

A Yes. He had some kind of pipe wrench.

Q How big was it?

A I'd say about a foot-and-a-half long.

Q What did he do with the pipe wrench?

A He shook it in the air at me. That's at the same time when he had said, "Move, white bitch, and you're dead."

Q Did he make any other threats to you later on?

A They took me to these apartments and he found a round stick laying on the ground, and I can't remember his exact words.

MR. CROWLEY: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Ms. Soto, let me ask you to look at this statement and see if you can refresh your memory here.

[32] MR. SCARDINO: We object to the prosecutor bringing a document to the witness and asking her to review it to refresh her memory without any indication of what the document is. The witness needs to be able to testify on her own without any assistance from the prosecutor.

THE COURT: She is allowed to refresh her memory.

If you want to identify that for the record, Mr. Crowley.

MR. SCARDINO: She would be able to refresh her memory with her own notes and not what the prosecutor reads.

MR. CROWLEY: Basically the law says that a witness can refresh their memory from anything.

MR. SCARDINO: Could we have her testify without reviewing the document first?

THE COURT: She's entitled to refresh her memory from the document, if that's what she's doing. Overruled.

Q Have you had an occasion to refresh your recollection?

A I guess.

Q Let me ask you, do you remember if Mr. Tennard made any verbal threats to you?

[33] A At the apartments where they took me to, yes, he did.

Q Let me go back. While you are still in the car, did you have any money with you?

A Yes, I did.

Q What did you have?

A I had $2.25 cents.

Q And what became of that $2.25 cents?

A Robert Tennard took it out of my purse.

Q Did he take the $2.25 cents?

A Yes, he did.

Q What was going through your mind at this time?

A That I was going to be raped and killed.

Q Now where did they take you?

A They took me to a government project.

Q Where was it located, do you remember?

A Well we were on the freeway, and as I stated, they were holding my head down in the back. The only thing

that I saw was a sign that said Calles Road. It was spelled C-a-l-l-e-s.

Q Calles?

A That could be the pronunciation.

Q And where did you go when you got out in that area?

A They took me upstairs to a vacant apartment.

Q How did they get you up to the apartment?

A They held me by my arms.

[34] Q Who held your arms?

A Robert and the one named Michael.

Q At that point did Mr. Tennard ever pick up any other type of weapon?

A He picked up a stick that I would say was about three feet long, and it was round, like something you would hang your clothes on, and he told me not to try anything funny or he would use it on me.

Q Did you believe him?

A I certainly did.

Q What happened when you got into the apartment?

A They took me to one of the bedroom.

Q Was it furnished or was anyone living there?

A No, it was a vacant apartment. It had no carpet. Wood floors. It was really dirty.

Q And what happened inside the bedroom?

A I was raped.

Q Could you go through the sequence? I know it's difficult for you to do, but if you would tell us what happened first.

A First they made me have oral sex with them.

Q Which one, Michael, Tennard or Doug?

A Tennard was first.

Q Would you state what he did, basically?

A He made me have oral sex and then he had regular sex [35] with me and then he had anal sex with me.

Q Were you ever ordered to take your clothes off?

A Yes, I was. When we got in the room, he instructed me to take my clothes off.

Q Were you lying on the floor?

A Yes. He told me to lay down on the floor.

Q What was the condition of the floor?

A It was very dirty.

Q What happened after Mr. Tennard finished?

A Michael came in.

Q And what did he do?

A The same thing.

Q How did Michael know when to come in?

A Robert got up and opened the door and told him it was his turn.

Q And what happened after Michael was through?

A The same sequence, he went and got the one called Doug.

Q Who went and got the one called Doug?

A Michael.

Q And what did Doug do?

A He just had vaginal intercourse with me.

Q And what happened after that?

A They told me to put my clothes on and then we got in the car and left.

Q Did Tennard say anything during the time he was [36] assaulting you?

A Not that I can remember.

Q Now, how were you escorted out of the apartment?

A The same way I was escorted in: One on each side of me and one in the back.

Q Who was in the back?

A The one called Doug.

Q Did the club ever appear again?

A Yes. He carried it in his hand, Robert Tennard did.

Q Where did you go from the apartment? Did you go to the car?

A Went to the car and from the car they took me to a house of someone they knew.

Q Do you know where the house was?

A I don't recall.

Q What happened when you got to the house?

A They were sitting – well, when we first got there, no one came to the door, and finally a guy in a black car drove up and they took me inside and they were sitting around, smoking pot, and they were taking some kind of pills, I don't know what. They asked me if I wanted some and I said no.

Q Was Tennard taking pills and smoking marijuana?

A Yes.

Q Were any threats made to you by Mr. Tennard at the [37] house?

A No. He just was discussing with his friend that drove the black car how he wanted to pimp me out.

Q Did he say anything about some other girls that hadn't done what he wanted?

A I recall him making the remark about something about a girl who didn't do what he wanted and she was dead now.

Q What happened at the house? Did you tell him you had to go somewhere?

A Yes. I told him I had to go take a bath. I told him that I wanted to take a bath. I felt really nasty and dirty.

Q How many people were at this house?

A I saw three or four. I saw three or four people.

Q Had you actually gotten physically dirty from that apartment floor?

A Yes, and from them.

Q Now you told them that you wanted to take a bath?

A Yes, I did.

Q Did Mr. Tennard say anything?

A He told me I wasn't going to try to run away, was I.

Q What did you tell him?

A I told him, "No, baby. I like you. I wouldn't do that."

Q Did he seem to buy this statement?

[38] A Yes, he did.

Q And what did you do?

A I went in the bathroom. I locked the door. It had a latch. It didn't have a doorknob lock. It had a latch. I locked the door.

Q You had your clothes back on at this time?

A I had my clothes on, yes. I locked the door. I turned on the bath water, went and looked at the window, found I could open it, stood on the toilet, pushed out the screen and jumped out the window.

Q And what happened when you jumped out the window?

A I ran to the next street over.

Q Did you find somebody on the next street?

A I had to knock on four or five doors, but finally someone did answer the door.

Q And what did you ask that person to do?

A I asked him if I could use their phone to call the police, that I had been raped.

Q And did they let you use the phone?

A Yes, they did.

Q Did some police officers show up?

A Yes, they did.

Q How soon after the call did they show up?

A I'd say approximately 20 or 25 minutes.

Q Do you recall who the officers were?

[39] A I don't recall their names. I do remember the officers.

Q Have you seen them here today?

A Yes, I have.

Q Now what happened when the officer arrived?

A He told me to get in the car, that he was going to take me downtown, because I didn't have any transportation. And I got in the car and I told them that I could show him where the house was where they had me.

Q Did you point out the house?

A Yes, I did. And at the time that we were turning the corner onto the street, the cars that they were in were driving away. They were leaving the house.

Q Did you point the car out to the officers?

A I pointed the car out to the officers that Robert Tennard was driving, and he attempted to chase the car and we lost it, but we spotted it stopped on another street.

Q After you spotted or saw the car, did you give the officer a description of him to put out on the radio?

A Yes, I did.

Q Was somebody brought back after you lost sight of him?

A Yes.

Q And who was brought back?

A Robert Tennard.

[40] Q And how was he brought back to where you and the officer were?

A By another unit.

Q At that time did you identify him as the person who had assaulted you?

A Yes, I did.

Q Let me ask you, of the three people that were involved in this, who did most of the talking?

A Robert Tennard.

Q Who appeared to you to be the leader?

A Robert Tennard.

MR. CROWLEY: Pass the witness, Your Honor.

THE COURT: Mr. Scardino.

CROSS EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Is it Mrs. Soto?

A Yes, it is.

Q Mrs. Soto, I want to ask you some questions about what you have testified to, and you may refresh your memory with whatever you want to remember, unfortunately, the incident that you just testified about. Okay?

Now you told the jury that three men pulled up, Tennard got out and drug you into the car, [41] threatened you with a wrench, then you got in the back seat and Tennard was in the front seat and they drove you to a house, where Tennard was the leader, and took you upstairs in a dirty room and Tennard had sex with you orally, vaginally and anally; is that right?

A That's correct.

Q And that they then took you to another location, where Tennard wanted you to be his old lady and asked

you if you would turn out for him or be a prostitute or a whore for him; is that right?

A He never asked me. He was discussing it with his friends.

Q And it was Tennard doing all that?

A Yes, it was.

Q And it was Tennard that you said did most of the talking and was the leader?

A Yes.

Q And you're sure about all that?

A Yes.

Q How long ago did all of that happen?

A It was in 1979.

Q And when it all happened, what you told this jury is the best of your recollection of what happened back then as you remember it now?

A That's correct.

[42] Q And it was a bad e- perience, it was a horrible experience, wasn't it?

A Yes, it was.

Q And at the time the police wanted to get all the information they could from you so that they could prosecute the men that had assaulted and raped you, did they not?

A I'm sure.

Q In fact, they took a statement from you, didn't they?

A Yes, they did.

Q And at the time you gave them a statement, do you remember how long after the incident that you gave them a statement?

A Two-and-a-half, three hours at the most.

Q So just right after it happened, you told the police about it; isn't that correct?

A Right after I got away.

Q And were you suffering from any sort of impediment that would keep you from remembering what happened? Like, were you sedated in any way or under the influence of any drugs or alcohol?

A No. I don't use drugs.

Q Well, I wasn't suggesting that you did. I was just going to ask you whether or not a doctor or somebody had sedated you as a result of your incident.

[43] A I did not go to the hospital first. I went directly to the Police Station.

Q And that's when you gave them the statement?

A Yes.

MR. SCARDINO: Could I see that, please?

MR. CROWLEY: Yes. Your Honor, I am tendering a copy to Mr. Scardino.

MR. SCARDINO: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Now, Mrs. Soto, when you gave the police the statement right after it happened, it was a different statement than what you have told this jury, is it not?

A I don't understand how.

Q Well, didn't you tell the police that the man that was the leader was a guy named Michael and that the guy that raped you initially, orally, vaginally and anally was a guy named Michael, that took you in and raped you, and after he got through, that the guy named Black came into the room and that Black made you have oral sex with him and then have regular sex with him. Did you not state that in your statement? The first guy was Michael who had sex with you in three different ways?

[44] A That's what is says.

Q It wasn't Robert Tennard, then was it?

A That's what it says.

Q And then it says the next guy that came in and had oral and vaginal sex and not anally?

A It does say that.

Q Then on the same page, "Michael then told me he wanted me to be his old lady. At this point, Michael had finished and he got up."

A I never said that Tennard asked me to be his old lady.

Q You didn't just tell that to the jury?

A No, I said he was discussing with his friends that he wanted to pimp me out.

Q But it was Michael that, you said, back in your statement on August 7th, 1979, that was doing the talking to you about something as absurd as being his old lady?

A Yeah, but he never threatened to kill me.

Q It was Tennard that threatened to kill you?

A Yes, it was.

Q Do you know where Michael is now?

A I sure don't.

Q Do you know whether or not Michael was ever caught and prosecuted?

A I never – no.

[45] Q No idea? How about Doug, was he ever caught and prosecuted?

A He was caught, but I never definitely could ID him.

Q Doug was the one that told you – who was driving the car?

A Michael, at first.

Q And then is what you told the police back in '79, that it was Michael that had had sex with you first and it was Michael that asked you to be his old lady?

A That's what my statement says.

Q And that's not what you just told this jury; is that correct?

A I did not tell the jury that Michael had sex with me first.

Q You told the jury that Tennard is the one that took you in the room first and had sex with you in three different ways?

A Yes, I did.

Q And that's just not what happened, though, is it?

A That's not what my statement says, no.

Q And then the last thing was that you asked if you could go clean up and one of the men that was there asked if you were going to try to get away; is that right?

A That's right.

Q And that was Robert Tennard, you said?

[46] A Yes, it was.

Q Was he drunk?

A He was probably high.

Q Did you see him smoking marijuana?

A Yes, I did.

Q Well, he wasn't so high that he couldn't rape you; is that correct? He raped you, did he not?

A He wasn't smoking pot at the time either.

Q Did you see how many cigarettes he smoked?

A No.

Q Well, was he acting different after he raped you than before he raped you?

A No.

Q Then you asked him if you could go clean up?

A I asked him if I could go take a bath.

Q And he said something to you?

A Yes, he did.

Q Tell the jury again what he said.

A He said, "You're not going to try to get away from me, are you?"

Q And you said no?

A I said, "No, I'm not. I like you."

Q And he let you go and take a bath?

A He let me go take a bath, yes.

Q And there was a window that could be opened in the [47] bathroom and you made your escape?

A Yes.

Q Thank you, ma'am.

MR. SCARDINO: Pass.

MR. CROWLEY: No further questions, Your Honor.

THE COURT: May this witness be excused?

MR. CROWLEY: Yes, Your Honor.

THE COURT: Ms. Soto, you may be excused.

* * *

Defense evidence, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts (trial transcript), 56-70]

* * *

[56] WILLIAM KINARD

was called as a witness by the Defense, and after having been previously duly sworn, testified under his oath as follows:

THE COURT: You may proceed.

DIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q State your name, please.

A William Kinard.

[57] Q Tell the jury what you do for a living.

A I work for the Board of Pardons and Paroles. I'm a parole officer.

Q How long have you worked as a parole officer?

A Right at about two years.

Q Did you ever have a parolee in your charge by the name of Robert Tennard?

A Yes, sir.

Q And have you appeared here under my subpoena?

A Yes, sir.

Q And did I ask you to bring any records with you besides bringing yourself?

A Yes, sir.

Q And what was that?

A You asked me to bring the records indicating Mr. Tennard's IQ level, as far as what TDC has.

Q Did I ask you to bring the records of Mr. Tennard's IQ level according to the Texas Department of Corrections' records?

A Yes, sir.

Q Do you know how the Texas Department of Corrections would have obtained that information?

A They give them a test. I'm not sure exactly what kind of test, what they test them for.

Q Are you saying while Robert Tennard was in the [58] penitentiary, that the Texas Department of Corrections, as a matter of course, would have had administered a test to determine his IQ?

A That's my understanding of their procedure, sir.

Q Do you have possession of those records as his parole officer?

A Yes, sir.

Q And are those records public as a matter of law?

A No, sir.

Q Are you under a penalty of law to reveal or produce any of those records to anyone?

A No, sir. Well, I'm instructed by the Attorney General, on one hand, to do what the Judge says, and so what he says to do, what I have to reveal, I have to reveal.

Q All right, sir. And did you in fact bring a documentation of what Robert Tennard's intelligence quotient is according to the test from the penitentiary?

A Yes, I did.

Q And what was the result of that test?

A It's a 67, sir.

Q Thank you, sir.

MR. SCARDINO: I'll pass.

[59] CROSS EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q Do you have that document with you, sir?

A Yes, sir.

Q Could I examine it, if you would?

A Yes.

Q This is basically your record?

A Yes, sir.

Q The only record you have of that?

A Well, that's the copy of it. I have got the original of it at TDC.

Q What I'm asking, this is the only record that reflects the IQ; is that correct?

A Yes, sir.

(Whereupon State Exhibit No. 186 was marked for identification purposes by the court reporter.)

MR. CROWLEY: Your Honor, at this time we would offer into evidence State Exhibit 186 and tender to Defense counsel for his inspection.

MR. SCARDINO: No objections.

THE COURT: No objections, State Exhibit 186 is admitted into evidence.

Q Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?

[60] A No, sir.

Q It's basically just sort of, as it says, social and criminal history of the Defendant?

A Right, sir.

Q And it says, there's basically a line for IQ, and it says 67?

A That's correct.

Q And it has no indication of who may have given those tests or under what conditions?

A No, sir, it doesn't.

MR. CROWLEY: Pass the witness.

REDIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Well, Mr. Kinard, you get that information from the Texas Department of Corrections as a matter of course in your job, don't you?

A Yes, sir.

Q So you didn't administer the test, did you?

A No, sir.

Q You're his supervising parole officer, are you not?

A Correct.

Q And you get this information that would help you in determining how to supervise him as a parolee, don't you?

[61] A Well, it gives us some background information about him, sir.

MR. SCARDINO: Pass.

RECROSS EXAMINATION

QUESTIONS BY MR. CROWLEY:

Q How long did you have Mr. Tennard under your supervision?

A He was released on the 25th of April, I believe, of '85, and I have had him since he got his present parole.

Q So it was about three-and-a-half months that he was on parole?

A Yes.

MR. CROWLEY: Pass the witness.

FURTHER REDIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q Well, do your records show how long he was in the penitentiary?

A Yes, sir. I could go back and find that.

Q Well, let me refer you to the exhibit the prosecutor just got into evidence, Mr. Kinard. Look at what's marked as State Exhibit 186.

A Yes, sir.

[62] MR. SCARDINO: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q Does it show the date that Mr. Tennard was placed in the penitentiary?

A Yes. He was sentenced on 3/10/1980.

Q And how many years did he get?

A Fifteen years, sir.

Q In fact, it shows when his sentence is to begin, does it not? Does it show a date?

A Correct.

Q What does it state?

A 8/7/79.

Q Would that show he was in jail from 8/7/79?

A Generally that's what it reflects.

Q So if he was supposed to have done something three or four years ago while he was out of the penitentiary, that would have been virtually impossible, wouldn't it?

A Well, sir, sometimes they get released on bond and then they're out on bond and then they commit another offense and then they get revoked off that bond. There's several ways that works.

Q Do your records show that he was continuously incarcerated from 8/7/79 until the release date that's indicated on this exhibit?

[63] A Yes, sir.

Q So you don't have any information other than he was placed in jail on August 7th, 1979, and was continuously there until about the third or fourth month of 1985?

A Fourth, month, you're right.

Q Does it show how old a man he was when he went into the penitentiary?

A It gives his date of birth. It has there 11/15/62.

Q It makes him 17 years old at that time?

A Yes, sir.

Q Does it indicate his age when he committed the rape that he went to the penitentiary for? Does it list his age at that time?

A Well, I would have to find out the date the offense was committed and then deduct it from that.

Q Your records don't indicate that he was 16 years old when that occurred?

A I have to go through there and look for it. I'm not sure.

Q Thank you, sir.

MR. SCARDINO: Pass.

MR. CROWLEY: No further questions, Your Honor.

THE COURT: May Mr. Kinard be [64] excused?

MR. CROWLEY: Yes, sir.

MR. SCARDINO: Yes, sir.

THE COURT: No objections, you may be excused.

(A recess.)

(Whereupon the jury was seated in the jury box.)

ERNEST PITCHER

was called as a witness by the Defense, and after having been first duly sworn, testified under his oath as follows:

THE COURT: The rule has been invoked, which you understand.

(Whereupon the following proceeding was held outside the presence of the jury.)

DIRECT EXAMINATION

QUESTIONS BY MR. SCARDINO:

Q State your name.

A Ernest Pitcher.

Q How are you employed?

A I am employed with Ray Hardy, Harris County District Clerk's Office. I am assigned to the 351st Criminal District Court.

[65] MR. SCARDINO: Your Honor, for the record, the jury is not present and this is on the motion of the State to determine whether or not this witness' testimony would be admissible in front of the jury or not.

May I proceed based on that?

THE COURT: All right.

Q Were you the clerk in that court when Daniel Groom was tried before Judge Pruett?

A Yes.

Q And when was he tried?

A The trial proceeding began in May of this year, on the 29th, and continued until last month, which was September.

Q Was it tried to a jury?

A Yes.

Q What was the verdict?

A It was guilty of capital murder.

Q And did the jury assess the punishment?

A Yes, sir.

Q And what was the jury's verdict?

A Life in the penitentiary.

Q Mr. Pitcher, are you in possession of the Court's records as the clerk of that Court that would reflect the findings of the jury in that case?

[66] A Yes, sir.

Q And do your records also indicate that Daniel Groom had a co-defendant?

A Yes, sir.

Q And who was the co-defendant?

MR. ANDERSON: We'll stipulate it's Robert Tennard.

THE WITNESS: Yes.

MR. SCARDINO: Pass.

THE COURT: Any questions?

MR. ANDERSON: No questions, Judge.

MR. SCARDINO: Judge, if we could have the record reflect that we would offer this testimony before the jury, because the theory of the State's case and the case against Robert Tennard includes Daniel Groom, and that Daniel Groom's name has been mentioned numerous times before this jury. In fact, the previous trial of Daniel Groom has been mentioned numerous times before this jury. The State has relied on information of things that Daniel

Groom did and said in order to present this case to this jury. In fact, the Court has even charged this jury under the conspiracy theory that Daniel Groom and Robert Tennard acted together to cause the deaths of [67] Neblett and Smith. And for these reasons and in conjunction with the relaxed rules on capital murder punishment, we submit to the Court that it is probative to this jury to determine that Groom received a life sentence instead of a death sentence. I think it's something they have a right to know its determination of some of the facts and circumstances that have been at issue in this case that were determined by the other jury that would be probative of what's fair and just for Robert Tennard would be a determination of what another jury had done with Daniel Groom.

THE COURT: Does the State want to respond?

MR. CROWLEY: I would. While relaxed, the rules are not that relaxed, and basically there's a long line of authorities that errored [sic] to admit the results of co-defendants. Certainly in this case we would never argue that we would be allowed to at the guilt stage that that jury found Daniel Groom guilty, and that would be reversible error. And basically what he is asking the Court to do is allow evidence that would have no bearing on deliberations of this jury. They are to make up their minds from the evidence they have heard in the courtroom without regard to what happened in the co-defendant's case.

[68] MR. SCARDINO: If I may respond to that. The State is not promoting this testimony. I am. It would be reversible error, it would be like offering a piece of evidence that the Court has ruled is not admissible from

the State. I can still offer it into evidence as my submission of the evidence.

MR. CROWLEY: The Court of Criminal Appeals says a good rule of evidence works both ways.

MR. SCARDINO: Well, the Court knows I can offer it and knows it wouldn't be reversible error if I offer it.

THE COURT: I am going to sustain the State's objection. I believe it would be improper and perhaps influence the jury in this case, and I believe it would be proper for them to decide the issues based on the testimony and evidence they have in this case and not based upon what some other jury decides.

In light of my ruling, can we excuse Mr. Pitcher or do you need him for any other reason?

MR. SCARDINO: No, I believe the record reflects what his testimony would be if the Court would allow us to call him before the jury.

THE COURT: You will be excused.

[69] MR. SCARDINO: We would like to have the witnesses we have in the courtroom sworn. We would like to have them sworn in front of the jury.

THE COURT: All right. Bring the jury in.

(Whereupon the jury was seated in the jury box.)

MR. SCARDINO: We would like to have some witnesses sworn.

THE COURT: All witnesses who are called in the Robert James Tennard case will stand and raise your right hands and be sworn.

(Whereupon the witnesses were duly sworn.)

THE COURT: The rule has been invoked, which means you can't discuss your testimony amongst yourselves nor with the other witnesses or allow the other witnesses to discuss their testimony with you. You will all be excused to the hallway until you are called individually.

Defense will call your next witness.

MR. SCARDINO: Defense rests, Your Honor.

THE COURT: Defense rests.

MR. CROWLEY: State closes, Your [70] Honor.

MR. SCARDINO: Defense closes.

* * *

Closing arguments, *State of Texas v. Tennard*,
No. 431127, 248th District Court of
Harris County, Texas (October 7, 1986)

[from Volume XXIX of the Statement of Facts
(trial transcript), 70-101]

* * *

[70] THE COURT: At this time, Mr. Anderson, you may proceed.

MR. ANDERSON: Ladies and gentlemen, I would like to preface my remarks, first of all, by first congratulating you on your verdict. You have done the proper thing in this case and it's not anything that any of you have taken lightly.

MR. SCARDINO: I object to the congratulating of the jury by the prosecutor on their [71] verdict as an endorsement of the verdict. We object to that.

THE COURT: Overruled.

MR. ANDERSON: And the reason for that, ladies and gentlemen, is that you have taken your oath very seriously. You have listened to the evidence, you have deliberated, and you have followed your oath and found this man guilty, as the evidence pointed, and I know you have taken that seriously and I know you will take this part of the trial seriously.

I am going to confine my remarks to special issue number one, which we talked to you about on voir dire, and, that is, whether or not this Defendant committed the act, that you have convicted him of, deliberately.

Before I get into that, I would just like to say a few things about my feelings on the overall evidence and the nature of this trial.

We heard Defense counsel talk about, it didn't matter whether someone was homosexual, black, white or otherwise, but then we heard reference to homosexuality about five times in his argument, and I hope you will follow your oath and the promise you made to me on voir dire, that these people – this is about other people and not anything else, not about where they're from, [72] how much money they have or what they do. It's about people, members of our community, former citizens of Harris County.

I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts. Look at what you promised us you'd look at, and remember you can't ever hear from Larry Neblett or Chester Smith again. They're not among us anymore, and that's what we're here about. They're human beings that are dead. They'll no longer be able to enjoy a nice day like today or a bad day or bad weather. They won't even have the experience of having a cold, something as simple as that, and that's been taken from them and it's been taken from them by this man here.

Now, our position at the outset has been clear. When we talked to you individually on voir dire, we told you there was no question that we were going to ask you to answer both of these special issues yes, because the evidence warrants that. Mr. Crowley will talk to you after

I'm through, and after Defense [73] counsel has their argument, about why the answer to special issue number two should be true.

Let me talk to you a little bit about special issue number one as it relates to the charge. The charge itself is not nearly as long or complicated as the charge that you took back on guilt/innocence. It's basically straightforward. It's a question of, do you feel the evidence shows and the State has proven beyond a reasonable doubt that, first of all, the conduct of the Defendant, Robert James Tennard, that caused the death of the deceased was committed deliberately. Remember the words we talked about on voir dire, "the reasonable expectation that the death of the deceased or another would result."

Now let me show you why the answer to that question should be yes based on the evidence. You remember we talked to you on voir dire in the hypothetical situation where a person goes into a bank and shoots a teller in the foot after he robs the teller to keep that teller from reaching the buzzer. He shoots the teller once in the foot and the teller bleeds to death.

There might be a question about deliberateness there, but remember we also said what about if a person goes in and puts the gun to the teller or the knife on [74] the teller and says, "Give me your money." The teller gets the money and realizes that they know one another, so he shoots the teller four times in the chest and kills him, because he says, "My God, I don't want to go back to the penitentiary. That person knows me. That person can give me up to the police. That person can sit in that witness stand and tell what happened."

And you remember we said, and you agreed, that that would be deliberate conduct.

Well, I submit to you that if nothing else in this case, the testimony of Dr. Espinola and the autopsy that he performed, State Exhibit No. 165, proves beyond any doubt that this was a deliberate act. The pathological diagnosis on the body of Larry Neblett, 10401 Onslow, Houston, Texas, autopsy report case No. 85-5002, performed August 18th, 1985:

"Lacerations of the scalp, (2)."

Those were not fatal, as you recall.

"Cutting wound of the scalp." That was not fatal.

"Stab wounds of the chest, (5)." Any of which would have been fatal.

"Stab wounds of the back, (10)." Two of which would have been fatal.

And I think Mr. Scardino said something fairly [75] interesting in his closing argument yesterday, talking about the fact that these could have been torture wounds. This man could have been torturing his victim, Larry Neblett, stabbing him shallow and then deeper and deeper and then deeper as the man struggled and tried to get away.

Now I apologize to you that we have got to introduce to you ugly pictures. I can't hardly stand to look at them, and I have seen a whole lot of them, and I know as citizens that have been brought in off the street from your jobs and your families, you don't see this kind of stuff very often.

MR. SCARDINO: I hate to object, but I have got to object to the reference of the other photographs that he has seen as not being in evidence and being improper argument.

THE COURT: Sustained. Don't refer to any that are not in evidence.

MR. SCARDINO: And we would ask the Court to instruct the jury to disregard the comment by the prosecutor.

THE COURT: Certainly disregard anything that's not in evidence, if it's any pictures that's not in evidence.

MR. SCARDINO: And we would ask [76] for mistrial.

THE COURT: And you are not to consider it for any purposes.

That will be denied.

MR. SCARDINO: Thank you.

MR. ANDERSON: And, again, it's never quit bothering me. It bothered me to look at these pictures, but I hope you will bear with me and realize it's necessary.

I want to make a point to you. First of all, if you'll take State Exhibit No. 159 back, you'll see the stab wounds to the left back of Larry Neblett. This was not accidental. It was not done in a fit of passion. These are cruel wounds inflicted to first hurt and then kill the victim. Again I apologize that this is the only way I can bring this to you, but here it is. And I ask you to look at it

when you go back there and consider the answer to special issue number one.

State Exhibit No. 161 shows the stab wounds to his chest, and I think you can see from the pattern of these stab wounds along with the pattern of the stab wounds to his back, that this man suffered, and these weren't wounds inflicted in self-defense by the Defendant. They were wounds to kill this man. One [77] would have killed him. Two would have killed him. Three would have killed him. And any of the seven that Dr. Espinola talked about would have killed him.

Why would somebody do something like that? Well, the State doesn't really have to show you why. We can't really go into somebody's mind and tell you what they're thinking at the time. We can only look at the facts and circumstances surrounding the actions of an individual, no matter how barbaric or how inhuman it is. And I think it's highly likely that this man killed Mr. Neblett because he knew, first of all, that Mr. Neblett would be able to testify against him and he knew he would be going back to the penitentiary and he knew that dead men tell no tales.

But through the pattern of the wounds on Mr. Neblett's body, it does tell you something. It tells you that it took him a long time to die and it tells you that he was incapacitated to where he couldn't chase anybody. These guys could have gotten away with his property. He was intoxicated. You know that. If they were just worried about getting the property and getting out, much like the individual who shoots the bank teller in the foot, they could have just held a knife on this man. He was intoxicated and he didn't have a weapon. They didn't stop there.

[78] They didn't stop there. They started stabbing, Mr. Tennard started stabbing and stabbing and stabbing and stabbing, and he stabbed this man fifteen times. And if you can come to any other conclusion that that was a deliberate act, then I apologize, because I made a vast error in judgment in putting you folks on the jury. Because I believe you are reasonable people and you promised me that you would use your common sense. And I don't see how you can come to any other conclusion but that this was a deliberate act.

Look at the weapon used. It's bent. Dr. Espinola said that could be from jabbing into hard bone. When Tennard couldn't find the mark, when he just missed placing it in between the ribs or in the man's soft part of his back.

The hatchet, that's self-explanatory.

The bottom line is, Mr. Tennard took a contributing member of our society, Larry Neblett, a human being who deserved to live and ought to be protected under the laws of our State, and turned him into a lifeless corpse after he had been invited into Mr. Neblett's home. I wish Mr. Neblett could be here to tell you exactly what happened, but by the evidence you've got, you can make that decision. You have got [79] plenty of evidence, and I submit to you that the only reasonable answer to special issue number one is yes: Yes, this was a deliberate act. When you stab a man in the back ten times and stab him in the chest five times, when, by gosh, you don't need to stab him at all if you're just trying to steal his property, then you have committed a deliberate act. You have deliberately taken his life. And you have gone even beyond that: You become almost an animal.

So I ask you folks just to review the evidence, please use your common sense and answer special issue number one as it should be answered. Thank you very much.

THE COURT: Mr. Scardino.

MR. SCARDINO: May it please the Court, prosecutors, ladies and gentlemen: That was a great final argument that Mike Anderson made to you. I thought it was touching and it was moving and it brought some things home. I could see you were interested in what he had to say and you listened to what he had to say. I could see you nodding your heads in agreement.

There's just one thing wrong with it: He's not a witness. He's a lawyer. He wasn't there. He obviously believes wholeheartedly everything Paul [80] Bogany told you. He had to accept it at full-face value. It convinced him or he wouldn't have gotten up here and told you what happened that night. Because he wasn't there. He is a prosecutor, and a real good one. You could tell by the way he handled himself and the way he argued his case with you. Why, you would have thought he was there the way he told you how it happened.

He forgot to mention to you that he had to believe Paul Bogany in order to tell you the story of what happened out there. And he took it all in at face value.

You don't have to do that. You can look at the testimony of Paul Bogany and you can accept some of it, like Judge Densen tells you, or you can accept all of it, like Mike Anderson just did, or none of it, or however many parts of it you want to accept in determining the answers to these two questions and whether this man lives or dies.

And I suspect that Sid Crowley is going to do the same thing. He's going to adopt Paul Bogany's statement, take it at face value as the gospel truth in interpreting what happened that night and how those two men got murdered. When they get up and make an eloquent argument to you like that, they have got to [81] adopt Mr. Paul Bogany's testimony.

Now it's a difficult time for you. It's the hardest part of a lawsuit. You've found my client guilty.

Remember, we're lawyers. What I say isn't any more testimony than what Mr. Anderson says. We're interpreting it for you. But we have all put in a lot of effort in this case, a lot of time, as you can see. You were brought in and out, but you don't see what we do when you're in here listening to testimony. You don't see all the work prior to trial, during the trial, at night and during the breaks. All the evidence that these prosecutors went out and gathered. There's a lot of evidence in this case. There were a lot of witnesses in this case. It took us almost two weeks to try this case. It took us months to pick the jury. It's as serious a matter as there is in this courthouse.

There's a lot of people here to watch it – the news, media, packed. All the citizens are in here and just can't wait to see what you folks do with Robert Tennard.

Well, there's not a whole lot here. They're probably upstairs watching the guy that's the Torch rather than a capital murder case. But I would like, [82] when you go back and decide the answers to these questions, you have a right to reconsider all the evidence. Remember they got up and said "We reoffer all the evidence, Judge," and I said, "So do I, and all the objections," and the Judge said, "Okay." Would you go back and look at it again in the light

of whether this man gets a life sentence or the death penalty? And give it some thought. Examine the evidence from the State's viewpoint. They're going to ask you to: Review what they have had to rely on and what they were able to gather up and bring in for you, what they did and didn't do, and my cross-examination of their witnesses and what it showed and what it didn't show. But please take that into consideration and think about it and mull it over before making your decision about the punishment of this man. Give it some thought and some time, because once you reach that verdict, that's it. No going back and changing anything.

Now I'm not going to get up here and preach to you. I'm going to try not to. Some may say I do. I am going to avoid that. And it's not my style to plead and beg. I'm not going to do that. But I would like for you to consider some things in deciding how to answer these questions.

Now what did the prosecution bring you besides [83] the testimony of a trial? What did they bring you on punishment? Well, they showed you that Tennard has been to the penitentiary for a bad case, a rape, and this poor lady that's sitting in the courtroom is the victim of it, and I'm sorry for her and there's nothing I can do about that. The law demands that the prosecution couldn't tell you about that during the guilt/innocence phase of the trial. They just couldn't do it. The law in Texas says they could let you know about it in the punishment phase, and that's what happened and that's what Judge Densen caused to happen. You were supposed to decide whether he's guilty or not based on the evidence they brought you, and now you can decide his punishment based on his prior criminal record, and that's what they brought you.

Now they brought you basically two witnesses or three witnesses, with the police officer, that said he arrested Tennard. They brought you Tracey Walker again, and I am puzzled by that. He said that Tennard stuck a gun in his face when he was drunk one night and told him he was going to blow his head off. Now, he said he had known Tennard for a long time, for nine years or more. Well, Tennard has been in the penitentiary for the last nine years, or, six, seven years, and he went when he was sixteen years old. So [84] how long could Tracy Walker have known him?

First of all, he lied to you. He said he did it about three years or so. It might have been longer. And on cross-examination, I tried to pin him down and he kept backing up: "Well, did it happen three years ago or six or seven years ago?" Well, you're supposed to accept that as helping you to decide whether or not Mr. Tennard lives or dies.

And this poor lady who was a victim of these three black youths, who kidnapped and raped her, I'm not going to tell you that was a bad case. It ought to make you mad. It makes me mad. I don't like it, but they tried to make more out of it than there was. They tried to show Tennard was the leader, that Tennard did this and Tennard did that. Well, clearly, clearly in cross-examination, he wasn't. It was bad, but he's not the first man, he's not the man that sodomized the lady. Well, he did sodomize her, but it wasn't three different ways; it was just two different ways. He was the second man, not the first man, and he clearly wasn't the leader who said "I'm going to turn you out and make you my old lady." It was Michael.

Who's the one who did time for it, who gets caught and serves time in the penitentiary for all three? Tennard. You didn't hear about the other two. [85] Where are they?

Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that Tennard has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.

Now special issue number one, in deciding that, you have got to apply the Court's instructions again. The Judge tells you a mandatory punishment for capital murder is death or confinement in the penitentiary for life. It tells you that the burden of proof is still on the State. It never shifts. So we don't have to prove or disprove anything. Each special [86] issue, that is, question one and question two, must be proved by the State beyond a reasonable doubt or you must not answer – he doesn't say this, but I am telling you, you must answer it no, unless they convince you beyond a reasonable doubt to answer it yes.

He goes on to tell you that if ten of you agree that the answer to one of the issues should be no, you are to then enter a verdict: No to that question. He tells you that if all twelve of you decide beyond a reasonable doubt that you're convinced the answer should be yes, then you have reached a verdict on that. So it's twelve for a yes and ten for a no on each issue.

Judge Densen goes on to tell you in his instructions that during your deliberations, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or the governor or how long the Defendant would be required to serve to satisfy a life sentence. In other words, you are to decide whether or not his sentence is a life sentence or a death sentence without looking beyond that.

Now what do you have to decide that? Special issue number one, the deliberate issue, we talked about that a lot on voir dire. What does deliberate mean? [87] What evidence is there to prove that Tennard deliberately took the life of Larry Neblett?

Now think about this: This isn't the kind of case where you have a witness that said "I saw him shoot him with the gun six times and I saw him walk over and put the gun to his head and blow his brains out." You don't have testimony like that. You don't have an eyewitness that saw the event that caused the death of the deceased.

You have got a witness, Paul Bogany, that says they went into separate rooms and he sees Neblett stagger to the door with some blood on him. We don't know how many times he's been stabbed now, but he says he sees him stagger to the door and then Groom comes up with his hatchet and whacked him in the head, and that was the

end of it. Didn't know how many times he had been stabbed at that point. And he says they started gathering things up and leaving, and then he says one of them says "That bitch done got up" or words to that effect, and then he says Groom and Tennard scramble back in there. He didn't see where they went or who was stabbed or who stabbed, so you don't really know, you don't have any direct testimony from anybody about who administered the fatal wounds to Mr. Neblett. You don't have that kind of testimony, so you're going to [88] have to guess who did that in answering special issue number one as to whether or not Robert Tennard deliberately caused the death of Larry Neblett.

Now think about that: If you answer that question yes, you're going to have to go home and think back through this trial when you have got plenty of time to think about it and you don't have the other jurors back there talking to you and trying to convince you one way or the other. When you get home, think about it, and the weeks and months to come, you are going to get to thinking about the evidence that the State has brought you to convince you beyond a reasonable doubt of whether or not it was in fact Tennard.

See, the law prevents us from knowing anything about Groom. We know there was a trial, and that's it. You heard testimony about that. So you don't get to hear anything about that. So in answering that question, you are going to have to make somewhat of a guess, because you don't have testimony of somebody that said, "I saw him take a life."

Now, the law demands that before a person can be executed, that you have got to have the kind of evidence

before you to convince you beyond a reasonable doubt that this is the man that caused his death. Not [89] guess.

Special issue number two, whether his actions would constitute a continuing threat to society, whether he would be a danger. This is what Mr. Crowley will talk to you about: Is there a probability that the Defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society beyond a reasonable doubt.

Now what evidence do you have of that? Well, Mr. Crowley is going to say, "Well, look, our position is, we believe Bogany and Stewart, and that he murdered Neblett and Smith, at least he was in there." Although nobody can testify they actually saw him raise a hand. And they'll say, "Look, when he was sixteen years old he kidnapped and raped this poor woman that's in the courtroom."

Now what other evidence do you have? Well, you can think about this: He is in an environment that prevents him from committing acts that would be a threat to society, or prevents him from committing acts that would be a continuing threat in the society that he's living in, like a penitentiary. You didn't hear any evidence and they have got the burden of proof and they had a right to bring you evidence of the time he spent in the penitentiary. I subpoenaed the parole [90] officer. They could have brought those records in here and showed them to you if there had been anything in there that had shown that he was anything other than a model prisoner when he was in the penitentiary, or they could have brought you the records of Harris County Jail where he's been for a year, since he was arrested, so you could see what kind of prisoner he was when he was right here. But there's been

no testimony about that. So you can take that into consideration in deciding the answer to special issue number two: Would he be a continuing threat to society if he was in the penitentiary?

Now the prosecutor, I suspect, will get up here and take these bloody pictures and wave them at you. He has a right to do that, and a good prosecutor would. And he'll try to get you to vote the way that he wants you to vote. But you remember that lawyers are advocates, that we take a position from the beginning of the case and we follow that through the case.

The prosecutor has taken the position of guilty and death, and he told you that in jury selection. And I'm taking a position, first of all, of not guilty and then not death. And then we promote those positions as best we can throughout the trial.

[91] Well, he's got something to work with. He's got bloody pictures, and they're bad. Mike Anderson is right, they're bad. And he's going to show them to you and he's going to talk about how poor Smith and Neblett aren't here to give you their version of what happened. And that may be unfortunate that they're not here, to have them somehow come back and tell you who actually did kill them and just how much of the truth Bogany was telling you. But they're not.

But remember the issue here today that you have influence on is not what happens to Smith and Neblett. You didn't have anything to do with making the decision of what happened to them. But you are here and you do have the power to make the decision of what happens to Robert Tennard. Don't let a good prosecutor that's a good public speaker get you revved up into the heat of the moment in

this trial to make a decision. Make your decision in a practical, detached way, by considering the evidence and looking at it in determining what it convinces you of or what it fails to convince you of.

Let me talk to you about capital murder for just a minute and what it means. I have tried a lot of capital murder cases and I have given it a lot of thought, and I am not here to tell you that I'm for or [92] against capital punishment. And we talked to you all about that on jury selection, whether you were or not, and all of you said you thought in a proper case you could give somebody the death penalty but that you would have to be awfully, awfully dead certain, convinced of it before you would. And I am asking you to stick to that statement now. Decide whether or not the person on trial in fact has met the legal burdens that Judge Densen has charged you with having to meet before you can cause his death.

We have had capital punishment in our society for as long back as we have had a society. In England they used to execute people on a daily basis for stealing from the King. It didn't stop people from stealing from the King because they had capital punishment on a daily basis. We adopted our system from the English and we had capital punishment after we formed our country.

If you remember back in the early days, they burned the witches in Salem and decided that was cruel and unusual punishment and that wasn't befitting of a modern society, so we quit burning witches. We used to hang people in the Old West. Finally we got law out there and quit doing that.

Texas had a law that said that if you were [93] convinced that somebody committed a death penalty offense,

they were executed by Old Sparky. Well, we decided that was cruel and inhuman and we abolished that. Now we kill people by lethal injection. That's the modern way to do it.

Well, I ask you when you go back in there and deliberate and you decide whether or not Robert Tennard lives or dies, you decide ten, fifteen years from now whether this exercise that we embarked upon would be a human and civilized procedure or not.

Now you're charged with acting as Robert Tennard's peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers. And I would ask you as you do that, as is your responsibility, you take into consideration the things that you have been informed of by me and by things the prosecutor has told you in judging Robert Tennard, and remember this: That when you go back there to decide whether you're convinced beyond a reasonable doubt, don't be influenced by a clever prosecutor's final argument of the testimony that's been presented to you. Remember [94] this: That if Robert Tennard goes to his death from this case, it will be based on the testimony of Fred Stewart and Paul Bogany. You think about that. That's what you're going to have to vote death on is on the testimony of those two men and adopt that, as the prosecutors have, in deciding what Robert Tennard's punishment is. And don't let Sid Crowley get up here and tell you to put blinders on and just answer the questions in a vacuum. The law allows you to take all the things into consideration that I talked to you about – attitude toward the death penalty,

take all these things into consideration, the 67 IQ – in deciding how you answer those questions. you have a right to do that under Texas law. Don't let Sid Crowley tell you you can't just look at the evidence and just answer the questions. You are allowed more latitude than that. Remember, what you do here will be forever lasting one way or the other. Remember, again, that it takes twelve of you to make a jury and not just one. When you're back there talking about the case, look at the jurors that are trying to get you to vote one way or the other and examine why they're doing that and what their motives are and what they want out of this case and analyze what you want to do based on what you've heard and what these other jurors heard and how [95] they interpret it and then you decide what you think the answer to these questions would be.

It's been a long trial and I appreciate everybody's patience and attention. Go back there and do what you have to do, but go back and do something that a month from now, when the heat of the moment is over, you won't regret. Thank you.

THE COURT: Mr. Crowley.

MR. CROWLEY: Ladies and gentlemen of the jury, at the outset, I would like to say that you have absolutely nothing to feel guilty about. The only person who is responsible for the situation that Robert Tennard now finds himself in is Robert Tennard.

There are some things about Mr. Scardino's argument that bothered me. He gave the argument of ten, twenty years ago or ten, twenty years from now will we still consider capital punishment human. Basically it seems to me a subtle argument to ask you to disregard the law. If

that is in fact the way citizens feel, it is their right to get their elected legislators to change that law. But each of you, when we questioned you on voir dire, and none of you relished the prospect of sitting on a case where it might be possible or in fact probable to return a verdict resulting in the death penalty, and I do not [96] take any real pleasure in presenting this type of case. It's a very serious, grave responsibility. But each of you said that if the evidence justified it in a proper case, that you could in fact answer both of those special issues yes.

Now I am not going to go back basically over the testimony that you heard over the last week and a half. That issue was resolved yesterday by your verdict.

I want to go back over some of that evidence as it relates to the Defendant's character, but also the evidence that you heard today. And I think after hearing Ms. Soto's testimony, you can see just what this Defendant is capable of; his character.

Special issue two asks, is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Scardino suggested that since the alternative is life imprisonment, he would be in a situation where he would not be a threat to society.

Ladies and gentlemen, I would suggest that concept, if the legislature in fact intended that, since the alternative will always be life, he would not be a threat, then the statute itself would be a [97] contradiction in terms – read that question carefully. The legislature did not frame it in terms of will he be a threat to other inmates, will he be a threat to other prisoners. It reads, is there a probability

that he would commit criminal acts of violence that would constitute a continuing threat to society. In other words, were he in society, is he the type of person that would commit those criminal acts that would constitute a menace. And, ladies and gentlemen, I think based upon the evidence, there is no other conclusion to answer but that he would.

Consider this: This Defendant is not yet 24 years old. His birthday is in November of 1962, yet in the past seven years he has managed to leave a trail of grief, victims and horror. He's had the opportunity to already serve seven years in the penitentiary, and you saw from the official records, he was out in less than three-and-a-half months before he graduated from the already very serious crime of rape to the ultimate of murder. The murder of Larry Neblett and Chester Smith. Mr. Scardino has told you that the Defendant has an IQ of 67. We heard no expert testimony from a psychologist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which [98] someone – we don't know who has – written in 67. But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

Look at the facts of the crime itself. you know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times.

Ladies and gentlemen, what did the other evidence show after the crime was completed? During the three days that he was at large, out trying to sell property, did he ever once express any remorse, any concern, for the two men laying dead in that house? No. The testimony showed that in fact his major concern was getting his fair share of the loot, not being cheated out of a few poultry [sic] dollars.

And what did they get out of this murder? A dilapidated stereo, some jewelry, and that was basically it. That's the price that Robert Tennard places on human life.

[99] You heard Valerie Soto testify. And it sets a pattern. Once again, Robert Tennard is the initiator, is the leader of the group.

What did he do that afternoon? It takes a special kind of person, a special kind of malevolence, if you will, to randomly abduct a citizen who's doing nothing more offensive than waiting for a bus to go to work, and he and three people took her for approximately five hours, raped her, threatened her with a wrench. He threatened to kill her. Remember, he threatened to kill Fred Stewart in the jail? The evidence just demonstrates this Defendant's utter callousness for the rights and regards and lives of other human beings. He has absolutely no concern or respect for his fellow citizens. He was so bold and brazen as to murder his neighbors that lived behind his house.

Again, as I remind you, he was in fact the leader. He was only sixteen years old, but had developed the type of character that would allow him to commit that kind of violent, serious crime.

Was he rehabilitated in prison? Obviously not. Because three-and-one-half months later, he went out and murdered Larry Neblett and Chester Smith.

Ladies and gentlemen, there's an equation that [100] we sometimes use, and it's the past versus the present equals the future. You have heard of his past, you have heard of his present. I would suggest that equals his future.

Again, look what he has managed to accomplish in less than 24 years of life. Valerie Soto has those horrible memories to live with. Evelyn Smith lost her brother Chester. James Neblett lost his son Larry, all at the hand of this Defendant.

Ladies and gentlemen, I am not going to wave bloody pictures around. I'm not going to rant and rave, because I think we're all too sophisticated for that and we all know what the law is asking you to do. The law is asking you to apply the evidence that you have heard to these two special issues and to answer them based upon that evidence. And I think, ladies and gentlemen, that based upon that evidence, you can reach no other conclusion but that, one, murder was committed deliberately and, two, that Robert Tennard would constitute a continuing threat to society.

I know it's not going to be an easy job and no one is going to enjoy it, but I am going to ask you to follow the law, as you took an oath to do, and to apply that evidence, and I believe that if you in fact follow that oath and apply the evidence, it will compel the [101] conclusion that there is no other possible answer than death to both special issues. Thank you.

* * *

State's Trial Exhibit 186, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

RESTRICTED
AND
CONFIDENTIAL

[SEAL]

TEXAS DEPARTMENT OF CORRECTIONS
Huntsville, Texas
SOCIAL AND CRIMINAL HISTORY

FIRST OFFENDER

Name: TENNARD, Robert James TDC #302700

True Name: TENNARD, Robert James

Interviewed: 4-2-80

Alias: TENNARD, Robert J. (AN#1) By: WC/dn

Date of Birth: 11-15-62 Age: 17

Medical Class: I

Soc. Sec. # Unk

E.A. 4.2 I.Q. 67

Segrative Class: I

Security Class: _____

Race: Negro Sex: Male

Court: 179th District

County: Harris

Offense(s): Rape (1)

Sentence: 15 years Sentenced: 3-10-80

To Begin: 8-7-79 Admitted: 3-18-80

Plea(s): Yes

Min. Expiration Date: 8-6-88

Max. Expiration Date: 8-7-94

Detainers: NO

(Number of Detainers – IBM Use Only)

Texas---------- _____ Federal-------- _____
O/States------- _____ Immigration-- _____

IBM CODES JOB CLASIFICATION:
_____ 1st Laborer _____
_____ 2nd _____
_____ 3rd _____
_____ Nativity: Houston, Harris Co., TX
_____ Citizenship: USA
_____ Residence (legal): Houston, Harris Co., TX
_____ Marital Status: Single
_____ Religion: Baptist
_____ Military Svc: None
_____ Co-defendants: Marvin Conway and one known only as "Doug"

PREVIOUS SENTENCE SUMARY:

	(Adult)	(Juv.)
Suspended Sentence-	—	—
Probation – (Fed.)-	—	—
Probation – (State)-	—	1

Det. Homes	1	Mil. Prison	—
Jails	1	T.D.C.	—
Reft'y.	—	O/Prisons	—

	Juv.	O/Inst.	T.D.C.	O/Pris.
Escapes	—	—	—	—
Attempted Escapes	—	—	—	—
Parole Violations	—	—	—	—

*DPS# 2710201 FBI# Unk

PRIOR TDC #

_____

Penalty Phase Jury Charge, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

CAUSE NO. 431127

THE STATE OF TEXAS	IN THE 248TH DISTRICT COURT
VS.	OF HARRIS COUNTY, TEXAS
ROBERT JAMES TENNARD	AUGUST TERM, A.D., 1986
	(Filed Oct. 7, 1986)

Members of the Jury:

By your verdict returned in this case you have found the defendant, Robert James Tennard, guilty of the offense of capital murder, which was alleged to have been committed on or about the 16th day of August, 1985, in Harris County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The Court instructs you further, however, as follows:

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes." If the jury unanimously

determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreperson will so record the Jury's answer to such issue by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue in the jury's deliberations.

If ten (10) jurors or more vote "No" as to any Special Issue, and only if ten (10) jurors or more vote "No," then the answer of the jury shall be "No" to that issue; and the Foreperson will so record the jury's answer by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if the jury returns an affirmative finding on each of the issues submitted, this court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

You are further instructed that in determining each of these Special Issues, you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

During your deliberations, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor, or how long the defendant would be required to serve to satisfy a sentence of life imprisonment.

During your deliberations upon the following Special Issues, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is now shown by the evidence.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given to their testimony, but you are bound to receive the law from the Court which has been given you and you are bound thereby.

/s/ Woody R. Densen
Woody R. Densen, Judge
248th District Court
Harris County, TEXAS

Penalty Phase Verdict Forms, *State of Texas v. Tennard*, No. 431127, 248th District Court of Harris County, Texas (October 7, 1986)

CAUSE NO. 431127

THE STATE OF TEXAS **VS.** **ROBERT JAMES TENNARD**	**IN THE 248TH DISTRICT COURT OF HARRIS COUNTY, TEXAS** **AUGUST TERM, A. D., 1986** (Filed Oct. 7, 1986)

The Special Issues, with forms for your answers, are as follow [sic]:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Virgil R. Faught, J.
Foreperson of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and detemine that the answer to this Special Issue is "No."

Foreperson of the Jury

THE STATE OF TEXAS	**IN THE 248TH DISTRICT COURT OF HARRIS COUNTY, TEXAS**
VS.	
ROBERT JAMES TENNARD	**AUGUST TERM, A. D., 1986**

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Virgil R. Faught, J.
Foreperson of the Jury

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this

Special Issue, find and detemine [sic] that the answer to this Special Issue is "No."

Foreperson of the Jury

VERDICT

We, the Jury, return in open court the above answers to the Special Issues submitted to us, and the same is our verdict in this case.

/s/ Virgil R. Faught, J.
Foreperson of the Jury

Trial Court's Findings on State Habeas, *Ex parte Tennard*, No. 431127-A, 248th District Court of Harris County, Texas (February 18, 1993)

CAUSE NO. 431127-A

EX PARTE	§IN THE 248TH §DISTRICT COURT
ROBERT JAMES TENNARD, Applicant	§OF §HARRIS COUNTY, §TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Having considered the Petition for Writ of Habeas Corpus and the Respondent's Original Answer, the Court makes the following Findings of Fact and Conclusions of Law based upon the documents filed in said cause and the official court records:

FINDINGS OF FACT

1. The applicant, Robert James Tennard, was charged with, indicted for and convicted of the felony offense of capital murder. The jury affirmatively answered the special issues and the trial court assessed punishment at death.

2. The Court of Criminal Appeals affirmed the conviction in an opinion delivered November 28, 1990. **Tennard v. State**, 802 S.W.2d 678 (1990).

3. The Supreme Court of the United States denied the applicant's petition for writ of certiorari on June 28, 1991. **Tennard v. Texas**, ___ U.S. ___, 111 S.Ct. 2914 (1991).

4. Robert Scardino and Joe Licata represented the applicant at trial in the instant case.

5. During the applicant's trial, the applicant introduced, through the applicant's parole officer who testified from the applicant's parole sheet, evidence that the applicant's "IQ" was 67; the State then introduced the applicant's parole sheet into evidence (R. XXIX – 57-58, 59).

6. The Court finds that "IQ" stands for "Intelligence Quotient."

7. The Court finds that no evidence was presented to the jury regarding what an "IQ" means or what a "normal" IQ is.

8. The Court finds that no evidence was presented as to what an IQ of 67 meant to the applicant.

9. The Court finds that there was no evidence of when or where the IQ test was administered to the applicant or if more than one IQ test was administered to the applicant.

10. The Court finds that there was no evidence of the reliability of the result of 67.

11. The Court finds that there was no scientific or medical explanation of the applicant's IQ.

12. The Court finds that evidence of the applicant's "E.A." of 4.2 was submitted to the jury as a notation on a parole sheet.

13. The Court finds that there was no evidence of what "E.A." stood for or what effect an "E.A." of 4.2 had on the applicant.

14. During the applicant's trial, Thomas Landry, branch manager for Peakload, a temporary employment agency, testified that the applicant worked at the labor pool during the week of the murders (R. XVII – 1037-1039).

15. The Court finds, based on evidence presented during the applicant's trial, that the applicant effectively used the bus system of the City of Houston (R. XXI – 192).

16. During the applicant's trial, Frederick Stewart testified that, after he had pawned a ring stolen from the complainant, the applicant complained to co-defendant Groom, that they had sold a television for too little and that he would not let them sell the ring for too little also (XXI – 178-181).

17. The Court finds that the applicant's interest and ideas concerning the disposition of the stolen property showed a basic understanding of business and the value of items (R. XXI – 181, 232).

18. During the applicant's trial, Paul Bogany testified that the applicant told him that the complainant was wary of strangers so Bogany should stay outside until the applicant convinced the complainant that Bogany was an "okay guy" (R. XXII – 393); that the applicant told Bogany to put socks on his hands so no fingerprints would be left at the scene of the murders (XXII – 405-406); that the applicant had Bogany and Groom gather and dispose of all the items at the scene that they might have touched to

destroy evidence linking them to the scene (R. XXII – 412-413); and that the applicant was the person who gave directions to Bogany and Groom during the offense (R. XXI – 438-439).

19. The Court finds, based on evidence introduced at trial concerning the facts of the offense, that the applicant had a significant ability to reason. **See Finding No. 18.**

20. Gladys Alridge, a friend of the applicant and his aunt, testified that the applicant babysat his niece and nephew (R. XXVII – 1020-1021).

21. Based on the evidence that the D was allowed to babysit his niece and nephew, the Court finds that those who knew the applicant felt that he was capable of accepting responsibility.

22. The prosecutor argued that the jury should consider the applicant's "I.Q." if they felt that it was appropriate (R. XXIX – 72, 97-98).

23. The applicant's trial counsel argued that the jury should take the applicant's "I.Q." into consideration in answering the special issues (R. XXIX – 93-94).

24. The applicant filed seven pro se motions prior to his trial (R. I – 84-113).

25. The Court finds that the applicant's **pro se** filing of motions prior to trial illustrates the applicant's cognitive ability.

26. The Court finds that there was no evidence presented that the applicant was unable to learn from his mistakes.

27. The Court finds that there was no evidence presented that the applicant had organic brain damage.

28. The Court finds, *in the instant case*, that the evidence presented at trial regarding the applicant's "I.Q." was not the "two-edged sword" condemned in **Penry v. Texas**, ___ U.S. ___, 109 S.Ct. 2934 (1989).

29. The Court finds that the applicant was twenty-two years old at the time of the offense.

30. The Court finds, based on the testimony of the applicant's parole officer, that the applicant spent time in correctional facilities as a youth (R. XXIX – 62-63).

31. The Court finds that the State argued that the jury should not put a great deal of weight on the "mitigating" evidence presented on behalf of the applicant; the Court further finds that the State did not argue that the evidence should not or could not be considered.

CONCLUSIONS OF LAW

1. The introduction into evidence of the notations of "I.Q. – 67" and "E.A. – 4.2," without further explanation, is insufficient to require a "**Penry**" instruction.

2. In light of the applicant's ability to work, to function as an individual in society, to file **pro se** motions, and to comprehend the process of ridding himself of stolen goods in exchange for money, the applicant's bare evidence of an IQ of 67 and an E.A. of 4.2 does not rise to the level of **Penry** evidence because Penry demonstrated a chronic disability to learn from his mistakes. **See and Cf. Ex parte Goodman**, 816 S.W.2d 383, 385-386 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered Goodman's IQ of 56,

intellectual level of an eight or nine year old and his possible brain damage in holding that a **Penry** instruction was necessary); **Ex parte McGee**, 817 S.W.2d 77 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered McGee's mental retardation, trauma to the brain at birth, IQ of 66, and that he did not have the ability to transfer information from one learning situation to another in holding that a **Penry** instruction was necessary); **Ramierez v. State**, 815 S.W.2d 636 (Tex. Crim. App. 1991) (Court of Criminal Appeals considered Ramierez's IQ of 57, his physical abuse at the hands of his father, and testimony of the doctor who performed the psychological evaluation in holding a **Penry** instruction was necessary).

3. The evidence of the applicant's "I.Q.", "E.A." and age was fully able to be considered under the special issues presented to the jury in the punishment stage of trial without an additional instruction.

4. The applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require an evidentiary hearing.

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 431127-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 431127-A, including his Petition for Writ of Habeas Corpus;

2. the Respondent's Original Amended Answer in cause number 431127-A;

3. this Court's findings of fact, conclusions of law and order denying relief;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent;

6. [sic] the indictment, judgment, sentence, docket sheet, and appellate record in cause number 431127, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Mandy Welch and Anthony Haughton, Texas Resource Center, 3223 Smith Street, Suite 215, Houston, Texas 77006, and to Respondent: C. Kari Sckerl; 201 Fannin; Houston, Texas 77002-1901.

SIGNED this ___ day of Feb. 18, 1993.

/s/ W. Densen
JUDGE PRESIDING

Opinion on State Habeas, Texas Court of Criminal Appeals, *Ex parte Tennard*, 960 S.W.2d 57 (Tex.Crim.App. 1997)

Court of Criminal Appeals of Texas, En Banc.

Ex parte Robert James TENNARD.

No. 71678.

Dec. 18, 1997.

Elizabeth Cohen, Austin, for appellant.

Kari Sckerl, Asst. Dist. Atty., Houston, Matthew Paul, State's Atty., Austin, for State.

Before the court en banc.

OPINION

McCORMICK, Presiding Judge.

This is a post conviction application for writ of habeas corpus filed pursuant to Article 11.07, V.A.C.C.P. We will deny relief.

In October 1986, a jury convicted applicant of capital murder, and sentenced him to die. This Court affirmed applicant's conviction and sentence on direct appeal. *Tennard v. State,* 802 S.W.2d 678 (Tex.Cr.App.1990). The United States Supreme Court denied applicant's petition for writ of certiorari on June 28, 1991. *Tennard v. Texas,* 501 U.S. 1259, 111 S.Ct. 2914, 115 L.Ed.2d 1077 (1991).

In this proceeding, applicant claims the Texas capital sentencing scheme applicable to his case[1] was applied to him in violation of the Eighth and Fourteenth Amendments to the United States Constitution. He argues the special issues failed to provide his jury a vehicle to give mitigating effect to "relevant mitigating evidence" of his youth, "youthful incarceration" and what he claims is evidence of his mental retardation, all in violation of *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Viewed in the light most favorable to the verdict, the evidence shows applicant and two others brutally murdered two men in their home during a robbery. See *Tennard,* 802 S.W.2d at 679. Applicant lived behind the home of the victims, and he knew them. The victims had invited applicant and his two friends into their home approximately fifteen to thirty minutes before they were attacked. Applicant stabbed one of the victims fifteen times with a knife while one of applicant's friends killed the other victim with a hatchet. Applicant played a dominant role in disposing of the victims' stolen property. Applicant presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders.

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[1] See Article 37.071(b)(1) and (2), V.A.C.C.P., (requiring the submission of two special issues to the jury: (1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and (2) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

The evidence from the punishment hearing shows applicant had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified applicant and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, applicant, who was displaying about a foot-and-a-half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."

The victim testified applicant and his friends took her to an abandoned apartment at some government project where applicant forced her to engage in oral, vaginal and anal sex with him. After that, applicant's two friends took turns sexually assaulting her.

Applicant and his friends then took the victim to another house where applicant began using drugs and discussing "pimping out" the victim. She asked applicant if she could go to the bathroom to take a bath, which he allowed her to do:

> "Q. Now you told them that you wanted to take a bath?
>
> "A. Yes, I did.
>
> "Q. Did [applicant] say anything?
>
> "A. He told me I wasn't going to try to run away, was I.
>
> "Q. What did you tell him?
>
> "A. I told him, 'No, baby. I like you. I wouldn't do that.'"

After applicant let the victim go to the bathroom, she escaped through a window, and applicant was arrested later that day. The victim testified applicant appeared to

be the leader during her ordeal. Applicant impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of applicant's friends was the leader.

Applicant's parole officer testified that a Texas Department of Correction's (TDC) record from applicant's incarceration for the rape conviction indicated he had a 67 IQ.

> "Q. . . . And did you in fact bring a documentation of what [applicant's] intelligence quotient is according to the test from the penitentiary?
>
> "A. Yes, I did.
>
> "Q. And what was the result of the test?
>
> "A. It's a 67, sir."

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before applicant committed this offense, and there is a notation on the record indicating applicant had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

> "Q. Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?
>
> "A. No, sir.
>
> "Q. It's basically just sort of, as its says, social and criminal history of [applicant]?
>
> "A. Right, sir.
>
> "Q. And it says, there's basically a line for IQ, and it says 67?

> "A. That's correct.
>
> "Q. And it has no indication of who may have given those tests or under what conditions?
>
> "A. No sir, it doesn't."

This is *all* the evidence presented at applicant's 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. Applicant also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

During closing arguments at the punishment phase, the prosecutor argued the facts of the crime itself showed applicant's "special dedication to violence."

> "Look at the facts of the crime itself. You know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times."

Applicant referred to the IQ evidence twice during closing arguments at punishment. He referred to the evidence in responding to portions of the rape victim's testimony:

> " . . . the information that they gave is that [appellant] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, 'Well, if I let you in there, will you leave?' And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got

> a man before us that has got an intelligence quotient before us that is that low."

And, he asked the jury to take into account the IQ evidence in answering the special issues:

> " . . . none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers."

Evidence of Youth and Previous Incarceration

Applicant argues the special issues failed to provide the jury a vehicle to give mitigating effect to evidence of his youth and evidence that he spent most of his formative years incarcerated. We disagree.

This Court and the United States Supreme Court have held the special issues allow the fact finder to give mitigating effect to evidence of a defendant's youth and good prison record. See *Johnson v. Texas,* 509 U.S. 350, 367-69, 113 S.Ct. 2658, 2669, 125 L.Ed.2d 290 (1993); *Jones v. State,* 843 S.W.2d 487, 497 (Tex.Cr.App.1992), *cert. denied,* 507 U.S. 1035, 113 S.Ct. 1858, 123 L.Ed.2d 479 (1993); *Ex parte Harris,* 825 S.W.2d 120, 122 (Tex.Cr.App.1991). And, we have held the special issues allow the fact finder to consider and give mitigating effect to evidence of a troubled or abusive childhood. *See Ex parte Jacobs,* 843 S.W.2d 517, 520 (Tex.Cr.App.1992); *Goss v. State,* 826 S.W.2d 162, 166 (Tex.Cr.App.1992); *Lewis v. State,* 815 S.W.2d 560, 567 (Tex.Cr.App.1991).

Since the special issues allow the fact finder to give mitigating effect to this kind of evidence, they also allow the fact finder to consider and give mitigating effect to any

mitigating qualities of evidence of "youthful incarceration." In any event, applicant has not established any "nexus" between his "youthful incarceration" and the "circumstances of the offense which tend[s] to excuse or explain the commission of this offense." *See,* e.g., *Earhart v. State,* 877 S.W.2d 759, 765 (Tex.Cr.App.1994), *cert. denied,* 513 U.S. 966, 115 S.Ct. 431, 130 L.Ed.2d 344 (1994). And, the proposition that evidence of "youthful incarceration" possesses any mitigating qualities is almost absurd. We hold the special issues provided the jury a vehicle to give effect to any mitigating qualities of the evidence of applicant's youth and "youthful incarceration."

Mental Retardation

Applicant also claims the special issues failed to provide the jury a vehicle to give mitigating effect to evidence of his "mental retardation." He claims this Court should "reaffirm its bright-line rule" that "'evidence of mental retardation falls beyond the scope of the [former] statutory special issues.'" *See,* e.g., *Earhart,* 877 S.W.2d at 765. The first question we must ask is whether there is any evidence that applicant is mentally retarded. Applicant would have this Court hold under *Penry* that a five-year-old reference in an obscure TDC record to applicant's IQ score of 67 shows applicant is mentally retarded, and that evidence of an IQ of 70 or less is sufficient evidence to support a finding of mental retardation. We decline to do so.

According to the American Association on Mental Retardation (AAMR), a person is considered to be mentally retarded *only* when there is evidence of: (1) subaverage general intellectual functioning, (2) concurrent deficits in

adaptive behavior, *and* (3) onset during the early development period. See David L. Rumley, Comment: *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty,* 24 St. Mary's Law Journal Number 4 1299, 1312-14 (1993). Texas has adopted the AAMR three-part definition of mental retardation in the "Persons With Mental Retardation Act." See V.T.C.A., Health & Safety Code, Section 591.003(13) ("mental retardation" means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period); V.T.C.A., Health & Safety Code, Section 591.003(16) ("person with mental retardation" means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior). And, *Penry* also expressly relies on the AAMR three-part definition of mental retardation.

> "Persons who are mentally retarded are described as having 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.' American Association on Mental Deficiency (now Retardation) (AAMR), Classification in Mental Retardation 1 (H. Grossman ed.1983). To be classified as mentally retarded, a person generally must have an IQ of 70 or below. (Citation Omitted). Under the AAMR classification system, individuals with IQ scores between 50-55 and 70 have 'mild' retardation. Individuals with scores between 35-40 and 50-55 have 'moderate' retardation. 'Severely' retarded people have IQ scores between 20-25 and 35-40, and 'profoundly' retarded people have scores below 20 or 25. (Citation Omitted).

> Approximately 89% of retarded persons are 'mildly' retarded. (Citation Omitted). *Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1."

The first part of the AAMR test is measured by IQ, and an individual must have an IQ test score of 70 or less to meet the first part of the AAMR definition of mental retardation. See 24 St. Mary's Law Journal Number 4 at 1316-17. However, that does not end the inquiry or mean that everyone with an IQ of 70 or below is mentally retarded; it means only that all mentally retarded persons have an IQ of 70 or below. Because of their unreliability in determining mental retardation, IQ scores should not be used as a "unitary measure of mental retardation;" a low IQ alone does not provide a justifiable basis for classifying a person as mentally retarded. See *id.* at 1329-35.

And, some argue that using IQ scores as the sole measure of mental retardation could have negative social consequences for all persons with low IQ scores who are "perfectly capable of a self-sustaining life." See *id.* at 1338-40. They argue this could present a potential danger to the liberty of these citizens. See *id.*

The second part of the AAMR definition of mental retardation is not quantifiable; it measures a person's ability to function properly in society such as, for example, meeting the needs of day to day life. See *id.* at 1317-20. And, the third part of the AAMR definition requires a person to exhibit parts one and two of the AAMR definition during his developmental period. See *id.* Once the three-part AAMR definition is met, IQ score ranges are utilized to measure the severity of mental retardation ranging from "mild" to "profound." See *id.* at 1321; *see also Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1.

Based on the foregoing, it arguably is clear that Johnny Paul Penry's evidence met the AAMR three-part definition of mental retardation and Section 591.003(13) of the Health and Safety Code. See *Penry,* 492 U.S. at 307-311, 109 S.Ct. at 2941-42. However, it is clear that applicant's evidence of a low IQ score, standing alone, does not meet this definition. Qualitatively and quantitatively applicant's low IQ evidence does not approach the level of Johnny Paul Penry's evidence of mental retardation. Based on the foregoing, we find no evidence in this record that applicant is mentally retarded.

Assuming the evidence of applicant's low IQ somehow falls within *Penry's* definition of mental retardation,[2] we still hold applicant is not entitled to relief under *Penry.* United States Supreme Court decisions before and after *Penry* have upheld the constitutionality of Texas' former special issues framework because this framework has allowed juries in the vast majority of cases to consider and give effect to relevant mitigating evidence in a meaningful manner. See *Johnson,* 509 U.S. at 361-67, 113 S.Ct. at 2666-68; *Graham v. Collins,* 506 U.S. 461, 473-75, 113 S.Ct. 892, 901, 122 L.Ed.2d 260 (1993); *Franklin v. Lynaugh,* 487 U.S. 164, 181-82, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Johnson* reaffirmed that as long as relevant mitigating evidence is within "the effective reach of the sentencer" the requirements of the Eighth Amendment are satisfied. *Johnson,* 509 U.S. at 367-69, 113 S.Ct. at 2669 (distinguishing *Penry* because special

[2] See *Penry,* 492 U.S. at 307-09 fn. 1, 109 S.Ct. at 2941 fn. 1.

issue two provided the jury a meaningful basis to consider and give effect to the mitigating qualities of Johnson's youth). All the Constitution requires is that a jury be able to consider in some manner a defendant's relevant mitigating evidence. See *id.* The Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." See *id.*

The issue in cases like this is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence.'" See *Johnson,* 509 U.S. at 367-71, 113 S.Ct. at 2669-70. We should evaluate the instructions with a "'commonsense understanding of the instructions in the light of all that has taken place at trial.'" *See Johnson,* 509 U.S. at 367-69, 113 S.Ct. at 2669. This involves a case-by-case approach requiring a consideration of the specific facts of each case. And, this is the approach the Supreme Court followed in *Penry. See Penry,* 492 U.S. at 307-14, 320-330, 109 S.Ct. at 2941-44, 2948-2952. There are no bright-line rules in cases like this.

In *Penry,* Johnny Paul Penry presented evidence that his mental retardation made it impossible for him at the time of the offense to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *Penry,* 492 U.S. at 307-09, 320-30, 109 S.Ct. at 2941, 2949; see also *Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667 (evidence suggested that Penry's mental retardation *rendered him unable to learn from his mistakes*); *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901 (Court considered Penry's evidence to be mitigating because *it diminished Penry's*

ability to control his impulses or to evaluate the consequences of his conduct). Johnny Paul Penry's evidence was relevant mitigating evidence because the Supreme Court identified a long-held belief by society "that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry,* 492 U.S. at 318-20, 109 S.Ct. at 2947; see also *Johnson,* 509 U.S. at 369-71, 113 S.Ct. at 2670.

However, the special issues placed the mitigating qualities of Johnny Paul Penry's evidence beyond the effective reach of the jury because it could not be determined for sure whether the jury could have given "appropriate" mitigating effect to the evidence in answering special issue one. See *Johnson,* 509 U.S. at 363-65, 369-71, 113 S.Ct. at 2667, 2770. More importantly, the jury could have given Johnny Paul Penry's evidence *only* aggravating effect in answering special issue two. *See Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667 (Penry's mitigating evidence was relevant to the second special issue *only* as an aggravating factor because it suggested a "yes" answer to that special issue); *Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949. Johnny Paul Penry was entitled to relief not because of his mental retardation standing alone, but because the special issues placed beyond the effective reach of the jury the mitigating qualities of Penry's evidence that his mental retardation rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense. *See also Johnson,* 509 U.S. at 363-65, 367-71, 113 S.Ct. at 2667, 2669-70; *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901; *Penry,* 492 U.S. at 307-09, 322-24, 335-39, 109 S.Ct. at 2941, 2949, 2956-57 (in light of the

diverse capacities and life experiences of mentally retarded people, it cannot be said that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty).

Here, there is no evidence applicant's low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct. *See Johnson,* 509 U.S. at 363-65, 113 S.Ct. at 2667; *Graham,* 506 U.S. at 473-75, 113 S.Ct. at 901. Therefore, there was no danger, as in *Penry,* that the jury would have given any mitigating qualities of the evidence of applicant's low IQ *only* aggravating effect in answering special issue two. *See Johnson,* 509 U.S. at 363-65, 369-71, 113 S.Ct. at 2667, 2669-70; *Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949.

In addition, the special issues did not place mitigating qualities of the evidence of applicant's low IQ beyond the effective reach of the jury. The jury could have used this evidence for a "no" answer to the first special issue on "deliberateness." *See Penry,* 492 U.S. at 322-24, 109 S.Ct. at 2949. Moreover, in considering the circumstances of this offense and applicant's prior felony rape conviction in connection with special issue two, the jury could have used the low IQ evidence to conclude applicant was a "follower" instead of a "leader" since he participated in the commission of both crimes with others. *See,* e.g., *Ellason v. State,* 815 S.W.2d 656, 660 (Tex.Cr.App.1991) (one factor to consider in determining whether the evidence is sufficient to support an affirmative answer to special issue two is whether the defendant was acting under duress or the domination of another at the time of the offense); see also

Johnson, 509 U.S. at 371-73, 113 S.Ct. at 2671. There was ample room within special issue two for the jury to give effect to any mitigating qualities of applicant's low IQ evidence.

All requested relief is denied.

OVERSTREET and WOMACK, JJ., dissent.

MEYERS, Judge, concurring.

Applicant contends the jury that sentenced him to death was unable to consider and give mitigating effect to evidence of his mental retardation, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[1] *See Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Applicant is not entitled to relief because the record does not contain sufficient evidence to support his claim.

I

In 1972, the Supreme Court held that the imposition of the death penalty in Texas for the offense of rape

[1] Appellant also claims the jury was unable to consider and give mitigating effect to evidence of his youth and youthful incarceration. Both this Court and the Supreme Court have rejected claims that evidence of youth and good prison record requires an additional jury instruction. *See, e.g., Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (youth); *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (good prison disciplinary record); *Jones v. State,* 843 S.W.2d 487, 497 (Tex.Crim.App.1992) (good behavior in prison), *cert. denied,* 507 U.S. 1035, 113 S.Ct. 1858, 123 L.Ed.2d 479 (1993); *Ex parte Jacobs,* 843 S.W.2d at 520 (education during prison); *Ex parte Harris,* 825 S.W.2d at 122 (youth).

violated the Eighth and Fourteenth Amendments to the United States Constitution.[2] Subsequently, the Texas legislature narrowed the scope of death penalty crimes to murder committed in specified circumstances, and required the jury to answer special issues regarding deliberateness, future dangerousness, and in some instances, provocation. *Jurek v. Texas,* 428 U.S. 262, 268-69, 96 S.Ct. 2950, 2954-55, 49 L.Ed.2d 929 (1976). In a plurality opinion, the Supreme Court upheld the new Texas death penalty scheme as facially constitutional, in part, because the special issues permitted the jury's *consideration* of mitigating factors. *Id.* at 272-74, 276, 96 S.Ct. at 2956-57, 2958. Not only must the defendant be allowed to present mitigating evidence to the jury, but the jury "must also be able to consider and give effect to that evidence in imposing [its] sentence." *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947 (citing *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)).

In 1989, that Court held that the special issues of article 37.071(b) were unconstitutional as applied to Johnny Paul Penry because they did not provide the jury with a vehicle in which to give full mitigating effect to evidence of Penry's mental retardation, arrested development, and background of childhood abuse. *Penry.* At Penry's trial, a psychiatrist testified "that Penry suffered

[2] *Branch v. Texas,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was decided in conjunction with *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Also decided with *Furman* was *Jackson v. Georgia.* In *Branch* and *Jackson,* the defendants were assessed the death penalty for committing rape; in *Furman,* the defendant was assessed the death penalty for committing murder.

from organic brain damage and moderate [mental] retardation, which resulted in poor impulse control and an inability to learn from experience," *id.* at 308, 109 S.Ct. at 2941, and that the organic brain disorder was probably caused at birth, but could have been the result of early childhood beatings. *Id.* at 308-309, 109 S.Ct. at 2941-42. Penry's sister testified that their mother frequently beat Penry with a belt over the head when he was a child, and that he was regularly locked in his room for long periods without access to a toilet. *Id.* at 309, 109 S.Ct. at 2941-42. The State presented rebuttal testimony from two psychiatrists who testified that Penry was not suffering from a mental defect at the time of the offense; however, the two psychiatrists also testified that Penry was unable to learn from experience. *Id.* 309-10, 109 S.Ct. at 2941-42.

The Supreme Court noted that evidence of Penry's mental retardation, arrested development, and abused background had "relevance to his moral culpability beyond the scope of the special issues," and that the jury could not consider and give mitigating effect to that evidence absent an additional jury instruction. *Id.* at 322, 109 S.Ct. at 2948-49. Further, Penry's evidence was considered to be double-edged under the second special issue in that it simultaneously diminished blameworthiness for the crime, but also indicated a probability of future dangerousness, *id.* at 324, 109 S.Ct. at 2949-50, and that the jury could only give aggravating effect to that evidence. *Id.* at 323, 109 S.Ct. at 2949. Thus, an additional instruction was mandated, one "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Id.* at 328, 109 S.Ct. at 2951-52.

Following *Penry,* this Court has been presented with numerous claims from other defendants sentenced to death asserting that absent a "*Penry* instruction," their sentencing juries could not and did not give mitigating effect to such evidence as, for example, alcoholism/drug abuse, troubled background, and certain types of mental illness. In cases too numerous to mention, this Court has rejected such claims as not falling within the *Penry* rule. *See, e.g., Robison v. State,* 888 S.W.2d 473 (Tex.Crim.App.) (childhood sexual abuse, schizophrenia, drug abuse, and remorse), *cert. denied,* 515 U.S. 1162, 115 S.Ct. 2617, 132 L.Ed.2d 859 (1995); *Mines v. State,* 852 S.W.2d 941 (Tex.Crim.App.1992) (insanity and manic depression), *vacated,* 510 U.S. 802, 114 S.Ct. 42, 126 L.Ed.2d 13 (1993);[3] *Ex parte Jacobs,* 843 S.W.2d 517 (Tex.Crim.App.1992) (troubled background, cooperation with police, remorse, and positive character traits), *cert. denied,* 509 U.S. 926, 113 S.Ct. 3046, 125 L.Ed.2d 731 (1993); *Ex parte Harris,* 825 S.W.2d 120 (Tex.Crim.App.1991) (circumstances of offense, remorse, cooperation with police, youth, and alcoholism). With one exception,[4] this Court has sustained a *Penry*

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[3] The Supreme Court vacated our judgment and remanded *Mines* to us in light of *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

[4] *Gribble v. State,* 808 S.W.2d 65, 75-76 (Tex.Crim.App.1990), *cert. denied,* 501 U.S. 1232, 111 S.Ct. 2856, 115 L.Ed.2d 1023 (1991). In *Gribble,* the defendant was sentenced to death for murder during the course of a kidnapping. Gribble claimed he had consensual sex with the deceased. Gribble presented evidence of a troubled childhood. Gribble's mother was institutionalized for mental illness and his father for burglary. Further, Gribble's mother sexually abused him when he was a small child. A psychoanalyst testified that those experiences, even if delusional, indicated the same mental illness as suffered by Gribble's mother, and that throughout his adult life, Gribble suffered from a

(Continued on following page)

claim *only* when there is evidence of mental retardation. *See Rios v. State,* 846 S.W.2d 310, 315 (Tex.Crim.App.1992), *cert. denied,* 507 U.S. 1051, 113 S.Ct. 1946, 123 L.Ed.2d 651 (1993); *Richard v. State,* 842 S.W.2d 279, 280-83 (Tex.Crim.App.1992); *Ex parte Williams,* 833 S.W.2d 150 (Tex.Crim.App.1992); *Ex parte McGee,* 817 S.W.2d 77 (Tex.Crim.App.1991); *Ex parte Goodman,* 816 S.W.2d 383 (Tex.Crim.App.1991); *Ramirez v. State,* 815 S.W.2d 636, 655-56 (Tex.Crim.App.1991). But even in those cases, the evidence of mental retardation was always something more than what was presented in this case.

II

The American Psychiatric Association (APA) has stated that the essential feature of mental retardation is "significantly subaverage general intellectual functioning"

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delusional fear of sexual domination which resulted in violence towards women. This Court held that under *Penry,* Gribble was entitled to an additional jury instruction.

In a case in a category by itself, this Court held the third special issue of article 37.071(b) was unconstitutional as applied. *First v. State,* 846 S.W.2d 836, 837-42 (Tex.Crim.App.1992). In *First,* the defendant was sentenced to death for murdering more than one person in the same criminal transaction. First and three acquaintances were leaving a bar when one of them attacked First and repeatedly slammed his head onto the sidewalk. When the attacker attempted to flee with one of the other acquaintances, First shot them. First's attacker was not the first named victim in the indictment. Since article 37.071(f) precluded the jury from considering the provocation of any other deceased besides that of the first named in the indictment, we held that the third special issue was unconstitutional as applied to First because the jury could not give mitigating effect to evidence of provocation on the part of First's attacker.

accompanied by "significant limitations in adaptive functioning," the onset of which must occur before age 18. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 39 & 46 (4th ed. rev.1994) (hereinafter *DSM-IV*); *see also* American Association on Mental Deficiency (AAMD), *Classification in Mental Retardation* 1 (Herbert J. Grossman ed.1983) (hereinafter AAMD) ("Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"). While dementia shares characteristics with mental retardation, its onset may occur after age eighteen. *DSM-IV* at 45, 137, 139.[5] However, for *Penry* purposes, courts should not distinguish between mental retardation and dementia. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L.Rev. 414, 422-23 (1985).

"General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered general intelligence tests (e.g., Weschler Intelligence Scales for Children – Revised, Stanford Binet, Kaufman Assessment Battery for Children)." *DSM-IV* at 39. "Significantly subaverage

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[5] According to the APA: The essential feature of a dementia is the development of multiple cognitive deficits that include memory impairment and at least one of the following cognitive disturbances: aphasia, apraxia, agnosia, or a disturbance in executive functioning. The cognitive deficits must be sufficiently severe to cause impairment in occupational or social functioning and must represent a decline from a previously higher level of functioning.

DSM-IV at 135.

intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." *Id.*; *see also* AAMD at 1. Professionals are flexible in their clinical assessments of mental retardation, sometimes determining that someone with an IQ of above 70 is mentally retarded or that someone with an IQ of below 70 is not mentally retarded. AAMD at 23. IQ tests differ in content and in the way they measure IQ. *Id.* at 56-57; *see Ex parte Williams,* 833 S.W.2d at 152. Therefore, it is important to know which test was administered in determining what an IQ score represents.

"Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her[6] age level and cultural group, as determined by clinical assessment and, usually, standardized scales." AAMD at 11. Such standardized methods of measuring an individual's adaptive functioning or behavior include the Vineland Adaptive Behavior Scales and the AAMD Adaptive Behavior Scale. *DSM-IV* at 40. A determination of adaptive functioning may also be made by teacher evaluation and educational, developmental, and medical history. *Id.* Thus, an individual should not be classified as mentally retarded unless he is deficient in

[6] Mental Retardation is more common among men than women. *Id.* at 44.

both intellectual functioning, as indicated by IQ, and in adaptive behavior.[7]

In the instant case, applicant's parole officer testified at punishment that applicant's parole record reflected that his IQ was 67. He testified that when applicant was incarcerated for a previous offense, the Texas Department of Corrections administered to applicant a test to determine his IQ, but the parole officer was "not sure exactly what kind of test, what they test them for." The parole officer further testified that applicant's parole record did not purport to be a psychologist's report, rather it was a

[7] In the Persons with Mental Retardation Act, the Texas legislature has adopted definitions similar to the AAMD and the APA regarding mental retardation:

> "Adaptive behavior" means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
>
> * * *
>
> "Mental retardation" means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.
>
> * * *
>
> "Persons with mental retardation" means a person determined by a physician or psychologist licensed in this state or certified by the department to have subaverage general intellectual functioning with deficits in adaptive behavior.
>
> * * *
>
> "Subaverage general intellectual functioning" refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used. Tex. Health & Safety Code Ann. § 591.003(1), (13), (16) & (20) (Vernon 1994).

record of applicant's criminal and social history. The parole officer acknowledged that the parole record did not indicate by whom or under what circumstances the test was administered.

During closing arguments, the prosecutor told the jury:

> I'm sure the Defense is going to ask you to forgive [applicant] for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts.

Defense Counsel remarked:

> Then I called a witness who testified he's [applicant's] parole officer. Uncontroverted evidence that when [applicant] was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer, what to do for him, how to help him when he's out on parole. Information that the prison psychiatrist had, the information that they gave is that [applicant] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have.[8]

[8] At punishment, a woman testified regarding an extraneous offense in which applicant and two men drove up to her while she was waiting for a bus to take her to work and forced her into their car. The men drove her to a vacant apartment where they took turns sexually

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> That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.
>
> * * *
>
> Now you're charged with acting as [applicant's] peers. You have to judge him as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and none of you are suffering from a 67 IQ.

The prosecutor responded:

> [Defense Counsel] has told you that [applicant] has an IQ of 67. We heard no expert testimony from a psychologist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which someone – we don't know who has – written in 67. But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question [the second special issue], the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

The evidence presented at applicant's trial did not show that applicant was mentally retarded as the AAMD or the APA has defined it. There was no testimony regarding when applicant's IQ was measured or what tests where

assaulting her. Afterwards, they drove her to another apartment where she managed to escape by telling applicant that she needed to take a bath. Applicant asked her if she was going to escape, she said no and applicant allowed her to go to the bathroom where she escaped through the window and subsequently notified the police.

used to measure it. There was no testimony as to the range of IQ or what is considered mentally retarded. There was no testimony or notation on the parole record that applicant was mentally retarded. And, the record is devoid of any evidence indicating that applicant's adaptive functioning was that of a mentally retarded individual.

Primarily relying on an unpublished opinion, applicant contends evidence of an IQ of below 70 alone requires a "*Penry* instruction." However, "[u]npublished opinions have no precedential value and must not be cited as authority by counsel or by a court." Tex.R.App. P. 77.3. The AAMD and the APA disagree with applicant's contention, and in the cases holding that a "*Penry* instruction" was required, the evidence of mental retardation consisted of more than evidence of an IQ below 70. *See Penry* (organic brain damage caused at birth or early childhood abuse and an inability to learn from experience); *see also Rios,* 846 S.W.2d at 315 (testimony from doctors regarding when and how defendant's IQ was measured and conclusion that he was mentally retarded); *Richard,* 842 S.W.2d at 280-83 (severe childhood abuse and doctor's conflicting conclusion that defendant was mentally retarded); *Ex parte Williams,* 833 S.W.2d at 151-52 (testimony regarding when and how defendant's IQ was measured and conflicting conclusions as to whether defendant was mentally retarded); *Ex parte McGee;* 817 S.W.2d at 79-80 (organic brain damage and severe childhood abuse); *Ex parte Goodman,* 816 S.W.2d at 385-86 (testimony that defendant was mentally retarded and possibly suffered from brain damage); *Ramirez,* 815 S.W.2d at 655-56 (childhood abuse, doctor's conflicting testimony as to whether defendant was mentally retarded, and psychological evaluation assessing intelligence and likelihood of organic brain dysfunction).

For these reasons, applicant is not entitled to relief.[9] I therefore join in the judgment of the Court.

PRICE, J., joins.

BAIRD, Judge, dissenting.

In a consistent and unbroken line of cases since the Supreme Court's decision in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), this Court has held evidence of mental retardation cannot be adequately considered within the statutory punishment issues.[1] However, rather than follow this settled precedent,

[9] Applicant is simply not entitled to relief on his claim because there is not enough evidence in the record to support it. The majority comes to this conclusion, too, *Tennard,* at 61, but goes on to offer another basis for denying relief. Assuming arguendo there had been enough evidence in the record of mental retardation, the majority says that reading *Penry*, and subsequent Supreme Court cases like *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), and *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), together, applicant still would not have been entitled to an additional instruction because there was no evidence that his low IQ "rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Id.* at 61-62. While I don't necessarily disagree with this reasoning, it is dicta and unnecessary to the disposition of applicant's claim. Moreover, it overrules several cases from this Court, without acknowledgment. *See Rios,* supra; *Ex parte Williams,* supra; *Ex parte Goodman,* supra.

[1] In *Penry,* the Supreme Court held our capital sentencing scheme operated in an unconstitutional manner when the statutory punishment issues of Tex.Code Crim. Proc. art. 37.071 failed to provide a vehicle for the jury to consider and give effect to potentially mitigating evidence. 492 U.S. at 328, 109 S.Ct. at 2952. During his trial, *Penry* presented evidence of an abused childhood, mental retardation and

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the majority ignores it to reach a desired result. Accordingly, I am compelled to lodge this dissent.

I.

When the evidence raises a fact issue concerning the defendant's mental retardation, the defendant is "entitled to an instruction empowering the jury to assess a penalty less than death, notwithstanding affirmative answers to the special issues, as a 'reasoned moral response' to the fact of his mental retardation." *Rios v. State,* 846 S.W.2d 310, 315 (Tex.Cr.App.1992). In *Rios,* appellant presented "testimony from two witnesses to the effect that appellant tested in the mildly retarded range." *Id.*, at 315. Both of the witnesses had examined Rios five years prior to the date of the offense. After reviewing the evidence presented, this Court held:

> In our view there was a reasonable likelihood that the jury in this case failed to understand

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organic brain damage. 492 U.S. at 308-09, 109 S.Ct. at 2941. The Supreme Court held:

> . . . full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime. In order to ensure reliability in the determination that death is the appropriate punishment in a specified case, the jury must be able to consider and given effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

492 U.S. at 328, 109 S.Ct. at 2951 (internal citations and quotations omitted) (emphasis in original). The Supreme Court concluded the statutory punishment issues of art. 37.071 failed to provide the jury with a vehicle to give effect to Penry's mitigating evidence. 492 U.S. at 328, 109 S.Ct. at 2952.

> that it was entitled to measure evidence of appellant's mental retardation for whatever mitigating weight it may have apart from the special issues. . . . Article 37.071 . . . does not expressly accommodate mitigating evidence apart from its relevance to the special issues. Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of our scheme to confound rather than inform. . . . Without clearer guidance it seems likely the jury would limit its consideration of appellant's mental retardation to whatever tendency it had to disprove deliberateness or to prove future dangerousness. Under *Penry* appellant was entitled to more.

Rios, 846 S.W.2d at 317.

In *Ex parte Williams,* 833 S.W.2d 150 (Tex.Cr.App.1992), the defense produced evidence through an expert witness that applicant had an I.Q. of 53, which is considered mentally retarded. *Id.*, at 151. The State offered rebuttal testimony from an expert witness who testified that "mental retardation cannot be determined solely from intelligence tests" and that further tests would have to be conducted to determine if the applicant was actually mentally retarded. *Id.*, at 152. This Court held "that applicant [Williams] was entitled to a charge instructing the jury that it could consider and give mitigating effect to evidence of his mental retardation." *Id.* (footnote omitted). We so held even though the State argued that it was not a *Penry* case, because there was no evidence of organic brain damage or injury to the applicant. However, this Court specifically refused to interpret "*Penry* to be so limited[,]" *Id.* (citing *Ramirez v. State,* 815 S.W.2d 636, 655-56

(Tex.Cr.App.1991)), and held that when a fact issue is raised concerning the defendant's mental retardation, the jury must be instructed in a manner allowing the jury to consider and give effect to such evidence. *Id.*, at 152.[2]

In *Ramirez v. State,* 815 S.W.2d 636 (Tex.Cr.App.1991), we again held that evidence of mental retardation could not adequately be considered within the statutory punishment issues. In *Ramirez,* Dr. Sarmiento, a defense witness, testified that six years before Ramirez's offense, Sarmiento reviewed an I.Q. test wherein Ramirez scored 57. On cross-examination, Sarmiento admitted he had never actually seen Ramirez and, at the time of the review, Sarmiento had counseled against finding Ramirez mentally retarded. *Id.*, at 655. Even so, we held: "Upon review of this evidence and the *Penry* decision, we are compelled to conclude [Ramirez] was entitled to a charge instructing the jury that it could consider and give mitigating effect to [Ramirez's] evidence." *Id.*, at 656.

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[2] This Court also found it important in *Williams* that during the prosecutor's closing argument, it was argued that there was "no proof of mental retardation." *Id.,* at 152, n. 7. This argument is very similar to the closing argument made by the prosecutor in the instant case:

> "[w]hether [applicant] has a low I.Q. or not is not really the issue. Because the legislature, in asking you to address that [second special issue], the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that [issue]."

However, the majority not only fails to mention the State's closing argument, it fails to mention that it was very likely this argument precluded the jury from giving mitigating effect to evidence of applicant's mental retardation. *See, Williams,* 833 S.W.2d at 152, n. 7.

In *Ex parte McGee,* 817 S.W.2d 77 (Tex.Cr.App.1991), evidence was presented that applicant had "scored 66 on an I.Q. test given shortly before trial" and that "[p]revious test results provided similar scores. . . ."[3] *Id.*, at 80. This Court set aside the conviction, holding: "the record reflects that McGee was mentally retarded." *Id.* Additionally, we again stated the importance of this type of evidence:

> The Eighth Amendment prohibits imposition of the death penalty when the jury is not permitted to express a "reasoned moral response" to potentially mitigating evidence. . . . Because the jury was not allowed to consider McGee's mitigating evidence of mental retardation and an abusive childhood as required by the Supreme Court's holding in *Penry v. Lynaugh,* we set aside the conviction. . . .

Id., at 80.

In *Richard v. State,* 842 S.W.2d 279 (Tex.Cr.App.1992), testimony was introduced at the guilt/innocence phase of appellant's trial that he had "an I.Q. score of 62, which places him in the upper limits of the mentally defective range." *Id.*, at 281. The witness then agreed that appellant

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[3] Just as in this case, there was no evidence presented at McGee's trial of when his I.Q. was measured or what tests were used to measure it. Nor was there any testimony as to the range of I.Q. or what is considered mentally retarded and there was no evidence indicating that McGee's adaptive functioning was that of a mentally retarded individual. However, this Court granted habeas relief. Nevertheless, Judge Meyers now thinks that all of the above are necessary. *See, Ante,* at 67 (Meyers, J., concurring). But our holding in *McGee* undermines his position.

was "educable mentally retarded[,]" but then on cross-examination he described appellant "as slow but not retarded – at least not in the way that most people think of retarded people, no." *Id.* (internal quotations omitted). This Court held: "[t]hese mitigating facts are quite similar to those detailed in *Ramirez* . . ." and that "[l]ike Ramirez, appellant tested in the 'mentally defective' range." *Id.*, at 283. Therefore, "appellant was entitled to a jury instruction authorizing the jury to impose a sentence less than death on the basis of this evidence." *Id.*, at 283.

In *Ex parte Goodman,* 816 S.W.2d 383 (Tex.Cr.App.1991), evidence was presented at the punishment hearing that applicant had an I.Q. of 56, an intellectual level of an eight or nine year old, attended school only to the sixth grade and that he possibly suffered from brain damage. *Id.*, at 385-386. We granted habeas relief because the "jury was precluded from giving mitigating effect to [Goodman's] evidence." *Id.*, at 386.

Especially compelling is the case of *Ex parte Bell* (Tex.Cr.App. No. 70,946, delivered November 6, 1991) (unpublished op.), where the following evidence was developed by Bell's stepfather:

> Question: Did – are you acquainted in any way – are you familiar with Walter's IQ?
>
> Answer: Yes.
>
> Question: And what is that?
>
> Answer: Fifty-four.
>
> Question: And has it been that way for some time?
>
> Answer: Yes.

> Question: To your knowledge, was it that way back in Nineteen-seventy-four?
>
> Answer: Yes.

Bell, slip op. pp. 2-3 (see Appendix). This Court held that "Bell presented sufficient evidence to raise the issue of his mental retardation [,]" *Id.*, slip op. pg. 2, and therefore, "the jury was not instructed to consider and, if necessary, give effect to the mitigating evidence of [Bell's] mental retardation." *Id.*, slip op. pg. 3.[4]

All these holdings were reaffirmed in *Earhart v. State,* 877 S.W.2d 759 (Tex.Cr.App.1994), where this Court held: "*evidence of mental retardation* falls beyond the scope of the statutory punishment issues." *Id.*, at 765 (emphasis added) (citation omitted). However, the majority does not even mention these cases, much less attempt to distinguish them from the instant case.[5] It is the height of intellectual dishonesty to intentionally mislead the bench and bar by failing to inform them of controlling decisions of this Court.

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[4] Because *Bell* was not designated for publication, it is not cited for its precedential value, but only as an example of the majority's refusal to treat similarly situated persons the same.

[5] Judge McCormick, who authors the majority opinion, either voted for or specifically concurred in each and every opinion discussed in this section. But today, in an effort to hide from those votes, he does not even inform the reader of their existence. Instead, Judge McCormick ignores his own advice, namely: "If a majority of this Court agrees on a principle of law, then that constitutes a 'holding' of this Court. . . . Principles of *stare decisis* requires this Court to follow its earlier majority opinions. *This is so basic that it requires no citation to authority.*" *State v. Daugherty,* 931 S.W.2d 268, 279 (Tex.Cr.App.1996) (McCormick, P.J., concurring and dissenting) (emphasis added).

II.

A.

The issue in this case is whether the jury had a vehicle by which it could consider the mitigating evidence.[6] However, the majority intentionally misstates the issue as: "The first question we must ask is whether there is any evidence that applicant is mentally retarded." *Ante*, pg. 60. In that view, the majority holds that to be mentally retarded, a person must show: (1) sub-average general intellectual functioning; (2) concurring deficits in adaptive behavior; and, (3) onset during the developmental period.[7]

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[6] In *Penry, supra,* the Supreme Court was not concerned with whether Penry was or was not mentally retarded. This is evidenced by the fact that in *Penry,* the Supreme Court granted certiorari, *inter alia,* to answer the following question:

> [W]as Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them?

Penry, 492 U.S. at 313, 109 S.Ct. at 2943-44.

[7] Both the majority, *Ante,* pg. 60, and the concurrence, *Ante,* pg. 65, n. 7 (Meyers, J., concurring), place much emphasis on the fact that the Texas Legislature adopted similar definitions in the Persons With Mental Retardation Act. *See,* Health & Safety Code § 591.003 (Vernon 1992). However, what both the majority and concurrence fail to mention is that these definitions were adopted in *1991, six* years after the commission of the instant offense and *five* years after applicant's trial. *See,* Acts 1991, 72nd Leg., ch. 76, § 1. Additionally, this definition was not even adopted by the American Association of Mental Retardation until 1992, and even then, the AAMR classified individuals with an I.Q. score of 75 and below as presumptively retarded. AAMR Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed.1992). *See also, Wills v. Texas,* 511 U.S. 1097, 1099, n. 1, 114 S.Ct. 1867, 1868, n. 1, 128 L.Ed.2d 488 (1994) (Blackmun, J., dissenting to

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Ante, pg. 60. What the majority has done, in clear contravention of established precedent, is weigh the sufficiency of applicant's mitigating evidence and establish a legal threshold a defendant must meet to be entitled to a *Penry* instruction.

This Court has long held that it will not weigh mitigating evidence. A defendant is entitled to an instruction on every mitigating issue raised by the evidence, regardless of whether the evidence is strong or weak, unimpeached or contradicted and regardless of whatever the trial judge may think about the credibility of the offense. *Arnold v. State,* 742 S.W.2d 10, 13 (Tex.Cr.App.1987). For example, in *Ex parte Ellis,* 810 S.W.2d 208 (Tex.Cr.App.1991), the State contended Ellis was not entitled to relief under *Penry* because the "evidence was not argued as mitigating

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the denial of certiorari) *and* N.M. Stat. Ann. § 31-20A-2.1(A) (Michie 1994) ("An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive of mental retardation."). Therefore, both the majority and the concurrence then hold applicant to an evidentiary standard that did not exist at the time of his trial.

This holding is especially strange in light of our holding in *Black v. State,* 816 S.W.2d 350 (Tex.Cr.App.1991), where we held that *Penry* constituted such a substantial change in the law that a defendant did not waive his right to assert a *Penry* violation by failing to object or request a mitigation charge at trial. *Id.,* at 374 (Campbell, J., concurring) (joined by McCormick, P.J., and Clinton, Overstreet, Maloney and Benavides, JJ.). It is absurd to on one hand excuse a defendant from making an objection or request but on the other hand to require the same defendant to meet a diagnostic definition that was not in existence at the time of his trial. However, this is what the majority and concurrence do. The consequence will be to effectively foreclose any successful *Penry* challenges in state court.

applicant's blameworthiness for the crime. . . ." *Id.*, at 211. Nevertheless, we held:

> . . . regardless of when this evidence was presented . . . it is before the jury, and it is a proper subject for the jury's consideration when answering the punishment issues. . . . *The question is merely whether this evidence was before the jury for its consideration.*

Id. (emphasis added). Therefore, it is clear that the issue is not whether applicant was, in fact, mentally retarded, but whether the jury had a vehicle with which to give effect to the mitigating evidence.

B.

In *Penry,* the Supreme Court acknowledged that an I.Q. score of 70 or below classifies an individual as "mentally retarded." *Penry,* 492 U.S. at 308, n. 1, 109 S.Ct. at 2941, n. 1. *See also, Wills v. Texas, supra* note 9. Further, in *Ex parte McGee, supra,* this Court recognized that "[i]n order to be considered mentally retarded, a person must score below 70 on an I.Q. test." 817 S.W.2d at 81, n. 15. *See also, Zimmerman v. State,* 860 S.W.2d 89, 105, n. 14 (Tex.Cr.App.1993) ("*Penry* implies that a person with an I.Q. of 70 or below is presumptively retarded.") (citation omitted). Accordingly, under the prior decisions of both the United States Supreme Court and this Court, applicant's I.Q. of 67 is presumptive of his mental retardation and the majority's holding that there is "no evidence in this record that applicant is mentally retarded" is simply wrong.

III.

A.

The majority then goes on to state that "[a]ssuming the evidence of applicant's low I.Q. somehow falls within *Penry*'s definition of mental retardation, we still hold applicant is not entitled to relief under *Penry.*" *Ante*, pg. 61 (footnote omitted). This is so, the majority reasons, because there was no evidence that his low I.Q. "rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low I.Q. rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct." *Ante*, pg. 62.

To reach this conclusion, the majority relies upon both *Johnson v. Texas,* 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), and *Graham v. Collins,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), for their proposition that applicant must prove his mental retardation rendered him unable to control his impulses or to evaluate the consequences of his actions.

Johnson contended the former version of Tex.Code Crim. Proc. Ann. art. 37.071 failed to provide the jury with a vehicle to consider and give effect to mitigating evidence of youth. 509 U.S. at 351, 113 S.Ct. at 2660. Johnson was nineteen at the time of his offense. 509 U.S. at 356, 113 S.Ct. at 2663. Recognizing that evidence of youth may be mitigating, the Supreme Court held:

> The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe

> that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination.

509 U.S. at 368, 113 S.Ct. at 2669. The Court concluded *Penry* does not require the jury to be able to give effect to mitigating evidence in every conceivable manner in which it might be relevant; mitigating evidence must only be within "the effective reach of the sentencer." 509 U.S. at 368, 113 S.Ct. at 2671. *See also, Graham,* 506 U.S. at 475-76, 113 S.Ct. at 901-902.

In *Graham v. Collins, supra*, Graham contended art. 37.071 did not allow his jury to consider and give effect to mitigating evidence of youth, family background, and positive character traits. 506 U.S. at 463, 113 S.Ct. at 895. In holding Graham's challenges were not cognizable on federal habeas corpus review, the Court stated: "We do not read *Penry* as effecting a sea of change in this Court's view of the constitutionality of the former Texas death penalty statute; it does *not* broadly suggest the invalidity of the special issue framework." 506 U.S. at 475, 113 S.Ct. at 901 (emphasis in original).

As the cases discussed in Section I, *supra,* illustrate, this Court has always held that the former punishment issues do not provide a vehicle for the jury to consider the mitigating evidence of mental retardation. Neither *Johnson* nor *Graham* impact those decisions; they only affirm the general proposition that most mitigating evidence is within the jury's reach when answering the punishment issues. Moreover, *Penry* was neither overruled nor questioned in *Johnson* or *Graham*.

B.

The majority, however, states the decision in *Penry* is premised upon the fact there was evidence presented "that his mental retardation made it impossible for him at the time of the offense to appreciate the wrongfulness of his conduct or to conform his conduct to the law." *Ante*, pg. 62. Thus, the majority concludes, without specifically saying so, there is a nexus requirement between the evidence of applicant's mental retardation and his moral culpability. However, this conclusion flies in the face of established precedent of this State.

In most cases applying *Penry,* this Court has required a "nexus between the mitigating evidence and culpability for the crime." *Lackey v. State,* 819 S.W.2d 111, 141, n. 10 (Tex.Cr.App.1989) (op. on reh'g). *See also, Goss v. State,* 826 S.W.2d 162, 165 (Tex.Cr.App.1992) ("the evidence must tend to excuse or explain the criminal act, so as to make that particular defendant not deserving of death."). A majority of this Court then adopted the nexus requirement in *Nobles v. State,* 843 S.W.2d 503 (Tex.Cr.App.1992). However, in our application of *Penry,* we have *never* required a nexus between mental retardation and the capital offense. *Richard,* 842 S.W.2d at 283 ("the Court has still not required an express showing of 'nexus' between evidence of mental defectiveness and the offense on trial."). *See also, Goodman,* 816 S.W.2d at 386; *Ramirez,* 815 S.W.2d at 655. This position was unanimously reaffirmed in *Earhart, supra*, where the Court stated: "we do not require proof of a nexus when the defendant presents evidence of mental retardation." 877 S.W.2d at 768, n. 9.

IV.

The majority has obviously ignored settled law to achieve a desired result. This case is a classic example of a defendant who should be able to rely upon the notion, predicated upon *stare decisis,* that in our judicial system similarly situated defendants will receive similar treatment. Because he is not so treated, I dissent.

APPENDIX
Ex parte Walter Bell, Jr.
No. 70,946
Habeas Corpus Application from Jefferson County
OPINION

PER CURIAM.

This is a post conviction application for writ of habeas corpus.[1] Walter Bell seeks to set aside his death sentences based upon the claim that the sentencing jury was not allowed to consider and give effect to mitigating evidence of his mental retardation, religious allegiance, military service, and good character. We granted review to determine whether a defendant who introduces such evidence is entitled to a *Penry* instruction. We will grant applicant's claim.

On July 19, 1974, Fred and Irene Chisum were found murdered in their home. A police investigation led to the arrest of Walter Bell, Jr. He later confessed to the crimes. A jury convicted Bell of the capital murder of Irene Chisum. After the jury answered the statutory special issues in the affirmative, punishment was assessed at death.

[1] *See* Article 11.07, V.A.C.C.P.

Bell's conviction was affirmed on direct appeal.[2] A second jury convicted Bell of the capital murder of Fred Chisum. Punishment in that case was assessed at death. Bell's second conviction was also affirmed on direct appeal.[3] This application relates to and arises from the second capital murder conviction.

In support of his claim, Bell relies upon *Penry v. Lynaugh*.[4] *Penry* declared the Texas death penalty scheme unconstitutional as applied because it failed to provide a manner by which the jury could consider and give effect to evidence of the defendant's severe childhood abuse and mental retardation. The special issues failed to provide a vehicle, which would allow the jury to express its "reasoned moral response" to mitigating evidence when it returned its decision. The Supreme Court, remanding the case, described mitigating evidence as that of a "defendant's background and character . . . [supporting a] belief, long held by society, that defendants who commit criminal acts that are attributable to [such circumstances] may be less culpable than defendants who have no such excuse."[5]

The trial court recommended that Bell be denied relief on the basis of procedural default. However, we have since recognized that a capital defendant does not waive his

[2] *Bell v. State,* 582 S.W.2d 800 (Tex. Crim. App. 1979) *cert. denied,* 453 U.S. 913, 101 S.Ct. 3145, 69 L.Ed.2d 995 (1981).

[3] *Bell v. State,* 724 S.W.2d 780 (Tex. Crim. App. 1986) *cert. denied,* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987).

[4] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[5] *Id.* at 319, 109 S.Ct. at 2947 (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

right to assert a *Penry* challenge when, at the time of trial, the right was not recognized.[6] As a result, Bell was not required to lodge a trial objection or request a special charge.

Bell claims that the special issues did not allow the jury to consider and give effect to evidence he presented at trial. Although evidence may be relevant to the second special issue, it may be relevant only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness.[7] When presented with evidence potentially reducing a defendant's moral culpability, a jury must be allowed to evaluate that evidence. If jurors are not afforded a vehicle allowing them to consider and give effect to such mitigating evidence, the death penalty scheme as applied does not pass constitutional muster.

Bell presented sufficient evidence to raise the issue of his mental retardation. The record reflects that Earl Brown, Bell's stepfather, gave the following testimony:

> Question: Did – are you acquainted in any way – are you familiar with Walter's IQ?
>
> Answer: Yes.
>
> Question: And what is that?
>
> Answer: Fifty-four.

[6] *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App.1991) (Campbell, J., concurring) (joined by McCormick, P.J., Clinton, Overstreet, Maloney, and Benavides, JJ).

[7] *Id.* at 323, 109 S.Ct. at 2949.

> Question: And has it been that way for some time?
>
> Answer: Yes.
>
> Question: To your knowledge, was it that way back in Nineteen-seventy-four?
>
> Answer: Yes.

* * *

This specific evidence was neither objected to nor controverted. This indicates that Bell falls within the mild range of mental retardation.[8] IQ test results included in his application show that he scored 58 in diagnostic tests administered after his arrest. However, we do not consider the post arrest test in support of Bell's claim as this evidence was not before the jury.

Penry teaches that the Eighth Amendment prohibits imposition of the death penalty when the jury is not permitted to express a "reasoned moral response" to potentially mitigating evidence. The Supreme Court has determined that mental retardation is mitigating evidence of the type that requires a vehicle by which the jury has the opportunity to express its reasoned moral response. Here, as in *Penry*, the jury was not instructed to consider and, if necessary, give effect to the mitigating evidence of mental retardation. Thus, we are constrained by the United States Supreme Court holdings in *Penry v.*

[8] In order to be considered mentally retarded, a person must score below 70 on an I.Q. test. *Penry*, 492 U.S. at 308 n.1, 109 S.Ct. at 2941 n.1 (citing Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash L. Rev. 414, 423 (1985)).

Lynaugh to hold, in the instant case, that the Texas death penalty scheme as applied to Walter Bell, Jr., is unconstitutional because the jury was not empowered to consider and give effect to his potentially mitigating evidence of mental retardation.

Accordingly, we set aside the conviction and order Bell Remanded to the custody of the Sheriff of Jefferson County to answer the indictment.

EN BANC

DELIVERED: November 6, 1991

DO NOT PUBLISH

McCormick, P.J. and White, J., concur in the result

Opinion on Federal Habeas, *Tennard v. Johnson*, Civ. No. H-98-4238, U.S. District Court, S.D.Tx. (July 25, 2000)

UNITED STATES DISTRICT COURT — **SOUTHERN DISTRICT OF TEXAS**

ROBERT JAMES TENNARD,	§	Civil Action H-98-4238
Petitioner,	§	(Entered Jul. 25, 2000)
versus	§	
GARY JOHNSON, Director, Texas Department of Criminal Justice,	§	
Respondent.	§	

Opinion on Denial of a Writ of Habeas Corpus

1. *Introduction.*

Robert James Tennard murdered a neighbor for his used Buick. He now seeks to avoid his death sentence.

Tennard argues that:

- He should have been allowed a mental health expert;
- The jury should have been told a co-defendant received a life sentence;
- The jury was not permitted to give mitigating effect to his low intelligence; and
- The prosecutor used peremptory strikes to remove African-Americans from the jury.

The writ of habeas corpus is an exceptional writ. Since before the Constitution it has protected individuals from

wrongful punishment. The writ allows individuals to assert that their criminal convictions and sentences violated the Constitution of the United States. In hearing an application for a writ, the federal court has limited power to reconsider a state's trial and appellate processes.

The state of Texas has the authority to kill a person as punishment. If that decision is constitutionally sound, both in substance and process, it must be affirmed by the federal courts. Texas is wholly bound by the Constitution and laws of the United States. This court's narrow, yet careful, review exists only to ensure that the state afforded full constitutional protection to a man it has sentenced to die. The standards must be high when the result is death.

Tennard's conviction and sentence were not constitutionally flawed.

2. *The Murder.*

Tennard and two friends, Paul Bogany and Daniel "Tiger" Groom, went to the home of Tennard's neighbors, Larry Neblett and Charles Smith.

While Tennard stabbed Neblett, Groom attacked Smith with a hatchet. Groom said that Smith might not be dead yet, and he told Tennard to finish killing Smith. Tennard replied "No. I took care of my victim. You take care of yours." Tr.XXII:410. Neblett, however, was not dead, and he broke a window trying to escape. Tennard and Groom stabbed Neblett again, and he died.

Tennard, Groom, and Bogany stole a record player, television, answering machine-radio, gasoline credit card, and jewelry. They loaded these items, together with a

blanket filled with items they thought they had touched in the house, into Smith's Buick and drove away.

3. *The Trial.*

Tennard was indicted for capital murder and two lawyers – Robert Scardino and Joe Licata – were appointed to defend him. In addition to usual police officers, the principal witnesses against Tennard were Bogany, who described the murders, and Fred Stewart, who testified that Tennard, Groom, and Bogany came to his house with the stolen property. Stewart let them unload the property into his house, and then he let them strip the car in his yard.

On October 6, 1986, Tennard was convicted of capital murder. The next day, the prosecution and Tennard presented evidence about punishment. The jury was then asked to answer these special issues:

> Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

The jury answered both of the special punishment issues "yes," and the trial judge sentenced Tennard to death.

4. *Appeals.*

The Texas Court of Criminal Appeals affirmed. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Tennard filed a state court petition for a writ of habeas corpus. The Court of Criminal Appeals denied Tennard's request for collateral relief. *Ex parte Tennard*, 960 S.W.2d 57 (Tex. Crim. App. 1997), *cert. denied*, 524 U.S. 956 (1998).

Tennard now petitions this court for a writ of habeas corpus, claiming that his constitutional rights were violated by (1) the trial judge's denial of his request for a mental health expert, (2) the jury's inability to give mitigating effect to his "mental retardation," (3) the trial judge's exclusion of evidence that Groom was sentenced to life in prison, and (4) the prosecutor's use of peremptory challenges purposefully to exclude black jurors. The Texas Court of Criminal Appeals denied the second claim on collateral review and the fourth claim on direct appeal. This federal petition is the first time Tennard has raised the first and third claims.

Johnson moved for summary judgment. Tennard replied to Johnson's motion and moved for summary judgment himself.

5. *The Antiterrorism and Effective Death Penalty Act.*

Tennard's petition, filed December 18, 1998, is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996. *Drinkard v. Johnson*, 97 F.3d 751, 766 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997). Under the AEDPA, federal habeas relief cannot be granted unless (a) the factual findings of the state court are based on an unreasonable determination of the facts in light of

the evidence, (b) the legal conclusions reached by the state court are contrary to clearly established federal law as determined by the United States Supreme Court, or (c) the mixed questions of law and fact are determined by the state court based on an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 120 S. Ct. 1495, 1521 (2000)

6. *Procedural Default.*

Tennard admits that he has not earlier raised his claims about the motion for an expert and the exclusion of Groom's life sentence. Relief cannot be granted by a federal court until the applicant has exhausted the remedies available through the state procedures. 28 U.S.C. § 2254(b); *Fuller v. Johnson*, 158 F.3d 903, 905 (5th Cir. 1998), *cert. denied*, 526 S. Ct. 1133 (1999). Conversely, however, an application for a writ of habeas corpus may be denied on the merits even though the applicant has not exhausted his opportunities for the remedies in the courts of the state. 28 U.S.C. § 2254(b)(2).

Johnson argues that Tennard's unexhausted claims are procedurally defaulted because, if presented now to the Texas courts, they would be denied as an abuse of the writ. Procedural default, to act as a bar, must be "firmly established and regularly followed." *Fuller*, 158 F.3d at 906 (citations omitted). New procedural requirements cannot bar federal court review sought by a person who under sentence of death who, in justified reliance on a state's earlier failure to apply an abuse-of-the-writ-doctrine, now seeks protection of his rights under the United States Constitution. *See Ford v. Georgia*, 498 U.S. 411, 423 (1991).

Tennard filed his state habeas application on April 7, 1992. At that time, the abuse of the writ doctrine was not regularly applied and, as a result, was "not entitled to respect as an independent and adequate state ground" for procedural default. *Lowe v. Scott*, 48 F.3d 873, 876 (5th Cir. 1995). Because Texas courts did not apply the abuse-of-the-writ-doctrine in a strict or regular manner, the courts cannot allow it to preclude claims when the petition was filed before 1994. *Emery v. Johnson*, 139 F.3d 191, 195 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998).

Tennard's unexhausted claims are not procedurally barred and are considered on their merits.

7. *Mental Health Expert.*

Tennard argues that he was unconstitutionally sentenced to death because the trial judge refused to grant him a mental health expert to testify during the punishment phase that Tennard was mentally retarded. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Johnson responded that Tennard provided no record support for his statement that the motion was denied. Although the record shows that Tennard asked for a mental health expert, the record does not show that the judge denied his request.

Tennard was given additional time, until May 20, 1999, to supplement the record to support his allegation that he was denied a mental health expert. On May 20, 1999, Tennard notified the court that he would not file a supplemental response.

The record does not support Tennard's statement that the trial judge denied his pretrial motion for a mental health expert. Tennard's inability to supplement the

record with evidence that the request was denied indicates that the evidence does not exist. Tennard cannot obtain federal habeas relief on this unsupported claim.

Even were the court to assume that Tennard's request for a mental health expert was denied, the only mental health issue alleged by Tennard is his low IQ. This issue was addressed fully at trial and was rejected by the jury. Tennard cannot obtain federal relief on this claim.

8. *Co-Defendant's Sentence.*

Groom was tried for capital murder before Tennard's trial. Groom was convicted and was sentenced to life in prison. Tennard wanted the jury to know about Groom's life sentence, but the trial judge excluded the evidence.

The Constitution requires that the jury be permitted to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Evidence of a co-defendant's lesser sentence is not relevant to the defendant's character, propensities, record, or offense's context. *Brogdan v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987). The law is clear that "a capital defendant is not entitled to introduce evidence of a codefendant's sentence." *Cordova v. Johnson*, 157 F.3d 380, 383 (5th Cir. 1998), *cert. denied*, 525 U.S. 1131 (1999).

The trial judge's exclusion of evidence of Groom's life sentence does not entitle Tennard to relief.

9. Low IQ.

Tennard argues that his constitutional rights were violated because the jury was not permitted to give mitigating effect to evidence of Tennard's mental retardation. Tennard cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), to support this claim. Tennard presented this claim in his state habeas application, and it was rejected. Evidence of a single low score on an unidentified intelligence test is not evidence that Tennard was mentally retarded. *Ex parte Tennard*, 960 S.W.2d at 61. Additionally, the special issues framework allows the jury to consider and give meaningful effect to relevant mitigating evidence. *Id.*

The requirements of the law are satisfied if the mitigating value of relevant evidence at trial is within "the effective reach" of the jury in responding to the punishment issues. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993). The evidence is within the jury's reach unless there is a "reasonable likelihood that the jury would have found itself foreclosed from considering" the evidence. *Johnson*, 509 U.S. at 368. The trial judge does not have to instruct the jury specifically that they must consider mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

The state district judge's factual findings about Tennard's level of intelligence are fully supported by the evidence. Although Tennard's prison records indicate an old IQ score of 67, Tennard presented no evidence about which test he took, who administered the test, and under what circumstances the test was given. The evidence at trial indicated that Tennard understood the value of the items stolen from Neblett and Smith, recognized the necessity of covering his hands to avoid leaving fingerprints, and

understood that he and his friends needed to remove from the murder scene items that might have their fingerprints. The evidence at trial indicated that Tennard gave directions to Bogany and Groom during the murder and in connection with disposing of the stolen property. The evidence supports the finding that Tennard's low score is not necessarily indicative of mental retardation and that Tennard's ability to reason and to accept responsibility indicates that his low IQ score does not interfere with his general intellectual functioning or behavior.

The holding that the jury in Tennard's case was permitted to give meaningful effect to Tennard's evidence that he has a low IQ is consistent with the law. Tennard presented evidence that his IQ was 67. His attorney argued that Tennard's low IQ affected his ability to act deliberately, citing as an example Tennard's having permitted a prior rape victim to escape through a bathroom window because he believed her when she told him that she would not try to run away if he let her go into the bathroom alone and take a bath. Tennard's attorney argued specifically to the jury that they should "take all these things into consideration, the 67 IQ – in deciding how you answer those questions. You have a right to do that under Texas law." Tr. XXIX:94.

Tennard's low IQ score was not concealed from the jury; it was in evidence, and both sides argued its significance for punishment. The jurors had the means to use Tennard's low IQ score to respond in his favor if they concluded the evidence affected the substance of those inquiries. *See Andrews V. Collins*, 21 F.3d 612, 630 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995) (unlike evidence of severe mental retardation, evidence of lower than average IQ is not mitigating evidence outside the

scope of the special issues). Since the court did not foreclose the jury directly or indirectly from considering Tennard's low IQ, the jury presumably considered it and determined that it did not require a "no" answer to either special issue.

10. Peremptory Strikes.

In his final claim, Tennard argues that the prosecutor used peremptory strikes in a racially discriminatory manner. *See Batson v. Kentucky*, 476 U.S. 79 (1986). To support his claim, Tennard compares the prosecutor's acceptance of prospective juror Emma Lou Hood with the prosecutor's use of peremptory strike to remove prospective juror Evelyn Guillory. Tennard's argument was rejected on direct appeal because the prosecutor offered a sufficient, race-neutral explanation for his decisions and Tennard failed to satisfy his burden to show purposeful discrimination. *Tennard v. State*, 802 S.W.2d at 681-82.

Batson challenges are considered in three steps. First, the defendant must make a *prima facie* showing that the prosecutor used his peremptory strikes in a discriminatory manner. If the defendant completes this first step, the prosecutor must articulate a race-neutral explanation for his decisions. The third step is for the trial court to decide whether the defendant has proven purposeful discrimination. *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998), *cert. denied*, 120 S. Ct. 83 (1999). In this case, Tennard, an African-American, recited into the record that the prosecutor used peremptory strikes to remove all but one African-American from the jury. The prosecutor then explained his decisions. The trial judge denied Tennard's challenge.

The appellate court must consider the evidence in the record in a light most favorable to the trial judge's determination. "Reversal is required only if the trial judge's findings of fact are 'clearly erroneous' in light of the entire record." *Tennard v. State*, 802 S.W.2d at 681. Based on this standard of review, Tennard's *Batson* challenge was rejected on appeal. The state court's factual findings are entitled to a presumption of correctness, which Tennard may rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Tennard's only argument in support of his *Batson* claim before this court is that the prosecutor used a peremptory strike to remove Evelyn Guillory, an African-American, and accepted Emma Lou Hood, a Caucasian.

Evelyn Guillory was questioned as a prospective juror when the prosecutor had twelve strikes left. She stated that she was uncomfortable answering questions about the death penalty because she had mixed feelings and was ambivalent about the death penalty. She stated that she does not believe the death penalty is a deterrent. She described her job as a social worker at a hospital as an "advocate for the patient and his rights as a patient." Tr. VI:514. The prosecutor used one of his remaining twelve peremptory strikes to remove Guillory.

Emma Lou Hood was questioned as a prospective juror when the prosecutor had only one peremptory strike left. Although she stated that she did not support the death penalty, she explained her opposition as based on a belief that "death is too easy." Tr. XVI:1677. Hood was also a social worker, but she worked for Harris County in the welfare department. She stated that she considered past criminal activity relevant to the future dangerousness

issue. She stated that punishment for the same crime should be the same whether the defendant is intelligent or slow, rich or poor. The prosecutor decided against using his last peremptory strike to remove Hood, and she became a member of Tennard's jury.

The comparison of the prosecutor's decisions about these two prospective jurors does not provide clear and convincing evidence that the prosecutor used peremptory strikes in a purposefully discriminatory manner. Instead, the prosecutor selected the less charitable of the two potential jurors. Tennard is not entitled to federal habeas relief on this claim.

11. Conclusion.

Tennard has not raised a claim that provides a legal basis for the relief he seeks. "Though the penalty is great and our responsibility heavy, our duty is clear." *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.). Tennard's petition for a writ of habeas corpus will be denied.

Signed July 25, 2000, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

Robert James Tennard, Petitioner

v.

Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docket for 02-10038

Oct 14 2003 Petition GRANTED and it is consolidated with no. 02-11309. Smith v. Dretke, and a total of one hour is allotted for oral argument in these cases. The motion of petitioner for leave to proceed in forma pauperis is granted.